SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

J. ALEXANDER CHILES.....Plaintiff in Error

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY....Defendant in Error

SUPPLEMENTAL BRIEF FOR APPELLANT IN ERROR ON MOTION TO DISMISS.

As the defendant herein has intimated to plaintiff that he will motion this Court to dismiss the WRIT for want of jurisdiction, and we knowing from the record, that the plaintiff an INTERSTATE PASSENGER, did specially set up and claim his right, as such, in his pleading, same proved by both his evidence, also that of defendant and that plaintiff prepared and offered, and asked the trial Court, to give the instructions which embodied his right and claim, aforesaid, and the same were refused and denied by the Court; and further knowing, that both trial and appellate courts in their respective judgments,

considered said right and claim, and denied the same, therefore we do anticipate defendant's said motion, and have prepared, and do present our SUPPLEMENTARY Brief, showing that a Federal question, in our judgment, is duly involved, and that this Honorable Court of High Justice, in our humble judgment, has jurisdiction, upon one or all of the three ways it duly appears in the record.

First. Because a Federal question appears from the pleadings, and was denied plaintiff.

Second. Because it appeared from the instructions asked for by plaintiff, and it was denied him.

Third. Because it appears in the judgment, both of the trial and the Appellate Courts, that it was respectively considered and denied him.

In our judgment, if one, if not all of the three reasons here stated, be established, that will be sufficient to warrant this Court in entertaining the WRIT, to re-examine the judgment of the State Court, and thereafter to revise or reverse it, as this Court in its wise judgment deems that JUSTICE demands.

First. A Federal question appears in plaintiff's pleading, etc.:

"Petition" (Record p. 1).

"The plaintiff, J. ALEXANDER CHILES, says that the defendant, Chesapeake & Ohio Railway Company, is a corporation, duly incorporated by law, and is now, and was at the times hereinafter stated engaged in operating a line of railroad from the City of Louisville, in the State of Kentucky, and the City of Cincinnati, in the State of Ohio, to the

City of Washington, in the District of Columbia, and was then, and is now a common carrier engaged in transporting passengers, for hire in its cars, over said line of railroad: that on the 12th day of April, 1904, the plaintiff purchased from the defendant corporation at Washington, D. C., for the sum of Fifteen Dollars ($15.00) which he then paid to the defendant, a first-class railroad ticket from Washington, D. C., to Lexington, Kentucky, and under said ticket, he, being an INTERSTATE COMMERCE PASSENGER, was entitled to ride continuously, in a first-class car on defendant's line of railroad from Washington, D. C. to Lexington, Kentucky."

He supported the allegations of his petition, by direct and uncontradicted evidence, as such a passenger, both by his own, and that of defendant's own testimony. (R. pp. 19 to 28, plaintiff's testimony): (R. pp. 28 to 45, defendant's testimony).

Having thus set up and claimed and proved, at the proper time, and manner in the trial Court, that he was an INTERSTATE PASSENGER, after all the evidence had been introduced, and case closed, by both sides he then prepared and offered, instructions to the Court, embodying his contention of the law of the case, and same were refused and denied him by the said trial Court, and it refused and declined to give any instruction whatever, on his right thus set up and claimed. Can it then be truthfully and successfully said that no Federal question was involved, nor set up in time, etc.?

From the earliest existence of our GOVERNMENT

to the present, there has been much discussion over and concerning a Federal question, and about the time of the death of Chief Justice Marshall, this question was given due consideration by JUSTICE STORY, who made a thorough examination of all cases prior to that time, and he arrived at the conclusion which had prior to his time, been followed and adhered to, and which since his time, has been likewise and is, the fundamental principle of this Court, to wit: That the record must show that such a Federal question did actually arise, and that it was decided adversely to the party specially setting up and claiming his right, under the Constitution, treaty or law, etc.

In Crowell vs. Randall, etc., 10 Peters, 368, Justice Story among other things says:

> "A motion has been made to dismiss the suit for want of jurisdiction upon the ground that there is nothing apparent upon the record to bring the case within the revising power of this Court under the 25th section of the Judiciary Act of 1789. That section confers, says he, appellant jurisdiction in this court from final judgments and decrees in any suit in the highest court of law or equity of a state in which a decision in the suit could be had in three classes of cases." He names them.
>
> But for our purpose we only name No. 3, to-wit: Where is drawn in question the construction of any clause of the Constitution or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission.

The section then goes on to provide: That no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid than such as appears upon the face of the record.

Justice Storey, after examining into the cases involving such questions, concludes thus: "These are all the cases, it is believed, in which the construction of the 25th section of the Judiciary Act has been made matter of controversy, and they extend over a period of more than twenty-five years. They exhibit a uniformity of interpretation of that section which has never been broken in upon. They establish, so far as the course of decisions can establish the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, re-affirm the interpretation which they have constantly maintained. It is, that to bring a case within the 25th section of the Judiciary Act, it must appear upon the face of the record. First, That some one of the questions stated in that section did arise in the State Court; Second, That the question was decided by the State Court as required in the same section; Third, That it is not necessary that the question should appear on the record, to have been raised and the decision made in direct and positive terms *ipsissimis verbis,* but it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment; Fourth, That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record that it did arise and was applied by the State Court to the case."

In Texas P. & R. vs. Abiline Cotton Oil Co., 204 U. S. 430, error to the Court of Civil Appeals, State of Texas, involving an alleged unreasonable interstate freight rate,

etc., exacted by common carrier from a shipper, Justice White delivering opinion, among other things, said:

> "It is insisted that this Court is wothout jurisdiction, because no Federal question is presented. We think it suffices to say, that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below, and is also essentially involved in the cause as it is before us."
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> The Western Turf Association vs. Greenburg, 204 U. S. 361; Erie R. R. Co. vs. Prudy, 185 U. S. 148.

In Chas. E. Yates, etc. vs. Jones National Bank, 206 U. S. 158, writ of error prosecuted to secure reversal of judgment from the Supreme Court of the State of Nebraska, motion made to dismiss; among other things, Justice White said:

> "A motion to dismiss first requires attention. The asserted want of jurisdiction, in this Court is based upon defendant's point of contention, that no Federal question was raised in, or decided by, the State Court, but, as will hereafter appear, the record plainly shows that both in the trial and appellate courts, an immunity was claimed under section 5239 of the Revised Statutes of the United States of 1901, page 3515, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the State court, and there is therefore jurisdiction, even if in other respects jurisdiction might not be exercised, as to which we are not called upon to decide."
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> Rutland Ry. Co. vs. Central Vt. Co., 159 U. S. 630; Spyers vs. Illinois, 184 U. S. 148.

In Murdock vs. Memphis, 20 Wallace 590, the Court among other things, said:

> "But if it be found that the issue raised by the question of Federal law, must control the case, or there has been no decision, by the State Court, in other matter or issue, which is sufficient of itself to maintain the judgment of that Court, then this Court will reverse that judgment, and will either render such judgment here as the State Court should have rendered, or will remand the case to that court for further proceedings as the circumstances of the case may require. In Baltimore & Ohio Ry. Co. vs. Maryland, 20 Wallace 643, the court further said: That where a Federal question has been raised and has been decided against the plaintiff in error, in the State Court, the jurisdiction of this Court attaches, and case must be heard upon merits, although the State Court also placed its decision on another ground, which did not present a Federal question. Both parties in the Supreme Court are entitled to be heard, when the record shows the existence of a decision, which gives us jurisdiction on the soundness of the decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided."

In Holt vs. Shelden, 1 Black 521, the court said:

> "The particular provision of the Constitution, which the plaintiff in error said has been violated need not be contained in the pleadings nor spread upon the record. The record must show that the question did arise, and that the court below could not have reached its conclusion without applying it to the case in hand. It need not appear that the State Court erred in its judgment. It is sufficient that the question was decided adversely to the plaintiff in error."

Powell vs. Brunswick County, 150 U. S. 433.

In C. B. & Q. Ry. Co. vs. People of the State of Illinois, 200 U. S. 561, involving relief asked by way of mandamus to compel the railway company to do certain things, Justice Harlan, delivering the opinion of the Court, among other things, says:

> "The first question is one of authority of this court to review the judgment below. As we have seen, the Railway Company insisted, in the court of original jurisdiction, that the statute under which the drainage commissioners proceeded could not be applied in this case without taking its property for public use without compensation, and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the Supreme Court of the State, the Railway Company by its assignment of errors preserved its objection based on constitutional grounds. The court did not in words refer to the Constitution of the United States, and its opinion concluded:
>
> "Entertaining the views above expressed, and founding our conclusions upon the rights and duties of the parties as found in common law, we deem it unnecessary to pass upon the constitutionality of section 40½ of the Farm Drainage Act."
>
> The contention is that as the State Court based its judgment on the common law duty of the Railway Company, and not expressly on any Federal ground, it cannot be said that there was any denial of the Federal right claimed by the Company. Consequently it is argued that this court is without jurisdiction to re-examine the final judgment. Undoubtedly the general rule is, that where the judgment of the State Court rests upon an independent

separate ground, of local or general law, broad enough, or sufficient in itself to cover tthe essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate without considering the question. But it is equally well settled that the failure of the State Court to pass on the Federal right or immunity specially set up of record is not conclusive, but this court will decide the Federal question, if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of the local or general law; and such plainly was the effect of the judgment in this case.

The claim of a Federal right or immunity, specially set up from the outset, went to the very root of the case, and dominated every part of it. If that claim be valid, then the law is for the Railway Company, for the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the Company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the Railway Company, on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not re-examine the judgment, but the decision was otherwise, and was, in law, a denial of the claim of a Federal right. For these reasons, we are of opinion that this court has jurisdiction to re-examine the final judgment of the State Court so far as it in-

volved the Federal right or immunity specially set up by the Railway Company."

These authorities, various decisions of this Court on this point, in our judgment, with the record possessing contention of plaintiff before it, are sufficient to justify this Court, if plaintiff establishes no other point why this Court should duly entertain this Writ.

Second. Because the Federal question appears of record in the instructions asked for by plaintiff, and same was denied him.

Plaintiff, after all the evidence had been introduced by both himself and defendant, asked the Court to give, four instructions, (R. p. 15) which were refused. One and four, are as follows, to wit:

No. One. "It being admitted, by the pleadings that the plaintiff did purchase a first-class ticket from Washington, in the District of Columbia, to Lexington, in the State of Kentucky, the Court instructs the jury, that at the time he was removed from the coach he was riding in from Washington to Ashland to the colored coach at Ashland, he was an INTERSTATE PASSENGER; and the Court further instructs the jury that the defendant had no right to compel the plaintiff to remove from the one coach into the other: and if the jury believe from the evidence that the defendant's employees, agents, or servants by the use of force, or by threats or menace, or force by duress compelled the plaintiff to move at Ashland, Ky., from the car in which he had ridden from Washington, into the coach set apart exclusively for colored passengers, they should find for the plaintiff such damages as he may have sustained by reason thereof."

No. Four. "The Court instructs the jury that the defendant had no right to eject the plaintiff under any rule or regulation requiring white and colored passengers to ride in separate coaches, unless at the time plaintiff purchased his ticket notice was given to plaintiff of the existence of such rule or regulation."

Thus it is clearly apparent that, on and in the instructions asked for by him, instructions which embodied his contention and controlled his right, etc., that a Federal question was involved. This Court has also spoken in decided unequivocal language on this point.

In National Mutual Building and Loan Association of New York vs. Frank Brahan 193 U. S. 635, Justice McKenna among other things, said:

"That a Federal question is presented in time, and in proper form, by requested instruction in a State trial court, asserting rights under the Federal Constitution, if they actually existed, entitling the party asserting them to an instruction directing a verdict in his favor. We think it very clear, says the Justice, that plaintiff in error was entitled to claim his rights under the Constitution of the United States, based upon the case as presented, and, if the rights asserted clearly existed, plaintiff in error was entitled to an instruction directing the verdict in his favor. The claim was therefore made in time."

Hammond vs. Whitesides, 204 U. S. 539; Mallett vs. N. L., 181 U. S. 589; Dewey vs. Des Moines, 173 U. S. 193.

In St. Louis I. M & S. Ry. Co. vs. Taylor, 210 U. S. 281:

Case involving damage on account of death, and certain instructions were asked for and refused in-

volving Federal question, Judge Moody said: "Where a party to litigation in a State Court insists by way of objection to, or request for, instructions upon a statute of the United States, which will lead, or on possible findings of fact from the evidence, may lead to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the State Court a right or immunity under law of the United States, and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the union. It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act which warranted on the evidence a judgment in its favor. The denial of its claims were decisions of Federal questions reviewable here."

Sullivan vs. Texas, 207 U. S. 416.

Chapman vs. Bowen, 207 U. S. 89.

Having, in our judgment conclusively established that a Federal question was likewise involved, refused and denied, same appearing from the instructions, in the record, we now proceed to establish, our third and last reason.

Third. Because it also appears, in the judgment, both of the trial and appellate courts that plaintiff's right, an

INTERSTATE PASSENGER, was considered, refused and denied.

In the judgment of Hon. Judge Parker, trial court, overruling motion of plaintiff, for NEW TRIAL, (R. pp. 9 to 13 inc.) among other things he said:

> "The facts appearing from the evidence in the case are not complicated. It appears clearly that at Ashland (Ky.) defendant (SHOULD be plaintiff) in changing cars offered to go into the white coach, and was notified by one of defendant's employees that he had no right to enter said coach: that the plaintiff thereupon informed this employee, that he, the plaintiff, was an "INTERSTATE PASSENGER," and had the right to ride in the white coach, and thereupon entered that coach and took his seat," etc.

The words after "INTERSTATE passenger"—words to wit: "and had the right to ride in the white coach" were not at any time spoken by plaintiff, nor by any other witness so far as the record shows. Plaintiff at all times, t obrakeman, conductor, the official, and the police officer, four different persons, asserted and insisted on his right, as an INTERSTATE passenger, and their testimony incontrovertibly establishes this fact. Neither one testifying, at any time that plaintiff said that he was going, or had a right, to ride in "the" or even "a" "white coach."

The trial court, as will be observed, from the opinion in record, aforesaid, denied plaintiff's right, discarded it, and after thus referring to INTERSTATE PAS-

SENGER, proceeded to dispose of the case, upon a purely local ground, not controlling in the case and derogatory of the rights and claims of plaintiff, and endeavored to support its ruling by both State and Federal decisions.

In the discussion, the learned Judge, says (R. p. 13):

> "It seems to me, that plaintiff misconceives his case. He claims that being an "INTERSTATE PASSENGER" the railroad company could not make the regulation in question, and that in attempting to do so, it was violating the laws of the UNITED STATES. If the decisions of the SUPREME COURT, and other decisions referred to, are to be relied upon this view is incorrect. In the case of Hall vs. De Curr, the SUPREME COURT, unmistakably declares that a common carrier may make this regulation, if it desires to do so, and that until Congress shall legislate differently, the regulation is valid."

Plaintiff says, Hall vs. De Cuir, decides that CONGRESS ALONE has the undisputed right to regulate INTERSTATE COMMERCE. Neither can the State nor a corporation, or a common carrier make rule or regulation subversive of or contrary to, THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The Appellate Court, in its opinion (R. pp. 46 to 53 inc.) in discussing this case, among other things, said:

> "In a few moments the *conductor* came in, and asked the appellant (plaintiff in error), *in obedience to a rule of the company* to go forward in the apart-

ment set apart for colored passengers. But appellant refused to do so, stating that he had bought a through first-class ticket, from Washington to Lexington, and was an INTERSTATE PASSENGER WHO KNEW HIS RIGHTS and that the SEPARATE COACH LAW OF KENTUCKY DID NOT APPLY TO HIM, and declared his intention of retaining his seat," etc.

After said Court had further discussed the case, stating that "it is admitted that sections 795 to 801 of the Kentucky Statutes," etc., do not apply to appellant, who was an INTERSTATE PASSENGER; it being conceded that the statute is only operative within the territorial limits of this State, and effective as to *passengers who travel from one point within the State to another place within its borders.*" And further the Court said: "To put it in a simpler form, etc., Has a railroad company within this State independent of the Statute, the right to adopt and enforce rules and regulations requiring colored passengers, ALTHOUGH THEY MAY BE INTERSTATE, and SOLELY BECAUSE OF THEIR COLOR AND RACE TO OCCUPY COACHES OR COMPARTMENTS IN COACHES separate and distinct from those occupied by white persons? Both of these queries must be answered in the affirmative." (R. p. 48). "And this rule extends to all passengers without reference to whether they are INTRASTATE or INTERSTATE."

After discussing this phase of the case for some length,

endeavoring to support its reasoning by both State and Federal authorities, it affirmed the judgment of trial Court.

We do not know by whom nor where in the record it was admitted, as above stated that Kentucky Statutes did not apply. We attempted to get this admission before the Court, the jury, but Court declined and denied the instruction which would have impliedly, at least, admitted that said Statutes did not apply, etc. Neither do we concede in any way that Kentucky Statute is "effective as to passengers who travel from one point within the State to another place within the border." To concede this would be surrendering plaintiff's contention, his rights as an INTERSTATE PASSENGER.

It is clearly evident, that even though he were an INTERSTATE PASSENGER, or if he had merchandises shipped from another state to him—that from the reasoning of the Court, as above stated,—that when he or it arrived "within the territorial limits of Kentucky," or "travel from one point within the State to another place within its border," the STATUTE OF KENTUCKY, and the RULES, ETC. of the Company would apply. Thus making the INTERSTATE COMMERCE CLAUSE, entirely and of no effect whatever to INTERSTATE PASSENGERS AND TRAFFIC when it came within its limits.

This is neither good Federal law, nor good State law,

except a case Smith vs. State, in 100 TENN. R. 494. The law is, that when the beginning and ending of the journey are within the limits of the State, then he is not an INTERSTATE PASSENGER, etc., but if his journey begin without the State to a point within the State; or if it begin within the State to a point without the State, then he is an INTERSTATE PASSENGER and the STATE law can not apply. Because CONGRESS alone has power to regulate INTERSTATE COMMERCE, etc.

Thus, from the JUDGMENT of TRIAL AND APPELLATE COURTS it appears that a FEDERAL QUESTION was involved and decided, against plaintiff on some local rule or law not controlling in the case.

In Elizabeth Chambers vs. Baltimore & O. R. R. Co., 207 U. S. 142, where the State Court endeavored to dispose of the cause in which Federal question was involved, by not directly passing upon it, Justice Moody, delivering the opinion in said case, wherein this Court entertained the suit, among other things, said:

> "The defendant objects to our jurisdiction to reexamine the judgment, because the Federal question was not properly and reasonably raised in the courts of the State. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of a Federal right, and that the decision of the question was essential to the judgment rendered; this is enough to give

this Court authority to re-examine that question on writ of error."

In Walter Wood Reaping Machine Company vs. Smith A. Skinner, 139 U. S. 293, Justice Brown said:

> "It is well settled by long series of adjudications that to give this Court jurisdiction by writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."
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> San Jose Land & Water Co. vs. San Jose Ranch Co., 189 U. S. 177. C., B. & Q. Ry. Co. vs. City of Chicago, 166 U. S. 226.

In Kaukauna Water Power Co. vs. Green Bay & Miss. Canal Co., 142 U. S. 254, Justice Brown said:

> "This Court has had frequent occasions to hold that it is not always necessary that a Federal question should appear affirmatively in the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State Court."

In Katherine Chlemmar vs. Buffalo, R. & P. Ry. Co. 205 U. S., p. 1, Justice Holmes delivering opinion of the Court, among other things, said:

> "Among the errors assigned was one in holding that the shovel car was not a car used in INTERSTATE commerce or any other kind of traffic. See errors of the court below. Supreme Court affirmed the judgment in words that we shall quote. We are of the opinion that the plaintiff's rights were saved,

and that we have jurisdiction of the case, subject to certain matters that we shall discuss. We now come to the main question. The opinion of the Supreme Court was as follows: Whether the Act of Congress has any applicability at all, in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the non-suit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject. It is said that the existence of contributory negligence is not a Federal question, and that as the decision went off on that ground, there is nothing open to revision here. We certainly do not mean to qualify or limit the rule that for this Court to entertain jurisdiction of a writ of error to a State Court, it must appear affirmatively that the State Court could not have reached its judgment without tacitly, if not expressly, deciding a Federal matter. But, on the other hand, if the question is duly raised, and the judgment necessarily, or by what appears in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it, and if it is evident that a ruling, purporting to deal only with *local* law, has for its premise or necessary concomitant a cognizable mistake that may be sufficient to warrant a review.

Kaukauna Water Works and Power Co. vs. Green Bay and M. Canal Co., 142 U. S. 254.

Murdock vs. Memphis, 20 Wall 590.

In San Jose Lard and Water Co. vs. San Jose Ranch Co., 189 U. S. 177, Justice Brown, in delivering opinion, among other things, said:

Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege, or immunity was specially set up or claimed by plaintiff in error, as required by the third clause of

Revised Statutes, 109, etc. (U. S. Compiled Statutes of 1901, page 575.) None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial and in the assignments of errors in the State Supreme Court. It also appears from the opinion of the court that plaintiff relied upon the Act of Congress of March 3, 1887, for the re-adjustment of land grant, etc., and the question considered by the court, and upon which the case turned, was whether plaintiff had brought itself within the scope of that Act. This question was considered by the court, and it was held that, defendant having acquired its rights prior to the Act of 1887, must prevail against the right claimed by plaintiff, while the right under the Act of 1887, thus considered, was not originally specifically set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument, and, under the rule of this court, requiring opinions to be sent up with the record. it has frequently been held to be a sufficient compliance with the words, "specially set up and claimed" that it was fully considered in the opinion of the court and ruled against the plaintiff in error."

The plaintiff therefore, having, in our judgment, indisputably and incontrovertibly established each proposition herein, and knowing that this Court is the highest Court of Justice, in this great Government, ordained "to establish justice, insure domestic tranquillity," etc., (Premable of Constitution of the United States) and believing also that from many of the decisions already rendered, that it delights "to keep judgment and to do justice," etc., (Isaiah 56:1. Micah 6:8, Rom. 13:1 to 7), upon the record, in causes brought before it, for that

purpose; and, we trusting, depending and relying upon God, from whom cometh our help (Ps. 121:1 and 2) and who is the source of all of our strength (Ps. 27:1), the GOD of JUSTICE: and believing further that the record and the law sustain our contention and that this Court has the unqualified right to entertain this WRIT, and then to re-examine the judgment of the State Court, and thereafter to affirm, revise or reverse the same, as in its wise judgment, JUSTICE demands. Therefore we do now, in conclusion state that in our humble judgment, that the said motion to dismiss the WRIT ought not to be granted; but to the contrary, that the relief duly sought for, by plaintiff, should be granted.

Respectfully submitted,

B. E. SMITH,

W. L. RICKS,

ALBERT S. WHITE,

J. ALEXANDER CHILES,

Counsel for Plaintiff in Error.

CITATIONS

JUSTICE:

Isiah 56:1.
Micah 6:8.
Romans 13:1 to 7.
Ps. 121:1-2.
Ps. 27:1.
Premable of the Constitution of the United States.

LAW.

Crowell vs. Randall, 10 Peters 368.
Texas P. & R. vs. Abiline Cotton O. C., 204 U. S. 430.
W. T. Ass'n vs. Greenburg, 204 U. S. 361.
Erir R. R. Co. vs. Prudy, 185 U. S. 148.
Yates, etc., vs. National Bank, 206 U. S. 158.
Murdock vs. Memphis, 20 Wallace 590.
B. & O. R. Co. vs. Maryland, 20 Wallace 643.
Holt vs. Shelden, 1 Black 521.
Powe LL v. Brunswick County, 150 U. S. 433.
C. B. & Q. R. Co. v. Ill., 200 U. S. 561.
N. M. Bldg. Ass'n vs. Brahan, 193 U. S. 635.
Hammon vs. Whitesides, 204 U. S. 539.
Mallett vs. N. C., 181 U. S. 589
Dewey vs. Des Moines, 173 U. S. 193.
St. Louis I. M. & S. Ry. Co. vs. Taylor, 210 U. S. 281.
Sullivan vs. Texas, 207 U. S. 416.
Chapman vs. Bowen 207 U. S. 89.
Chambers vs. Baltimore & O. R. Ry. Co., 207 U. S. 142.
Walter Wood R. M. C. vs. Smith Skinner, 139 U. S. 293.
San Jose L. & W. Co. vs. San J. R. Co., 189 U. S. 177.
C., B. & Q. Ry. Co. vs. City of Chicago, 166 U. S. 226.
Kaukauna P. Co. vs. Green Bay & M. C. Co., 142 U. S. 254.
Chlemmar vs. Buffalo R. & P. Ry. Co., 205 U. S. 1.

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ERRATA.

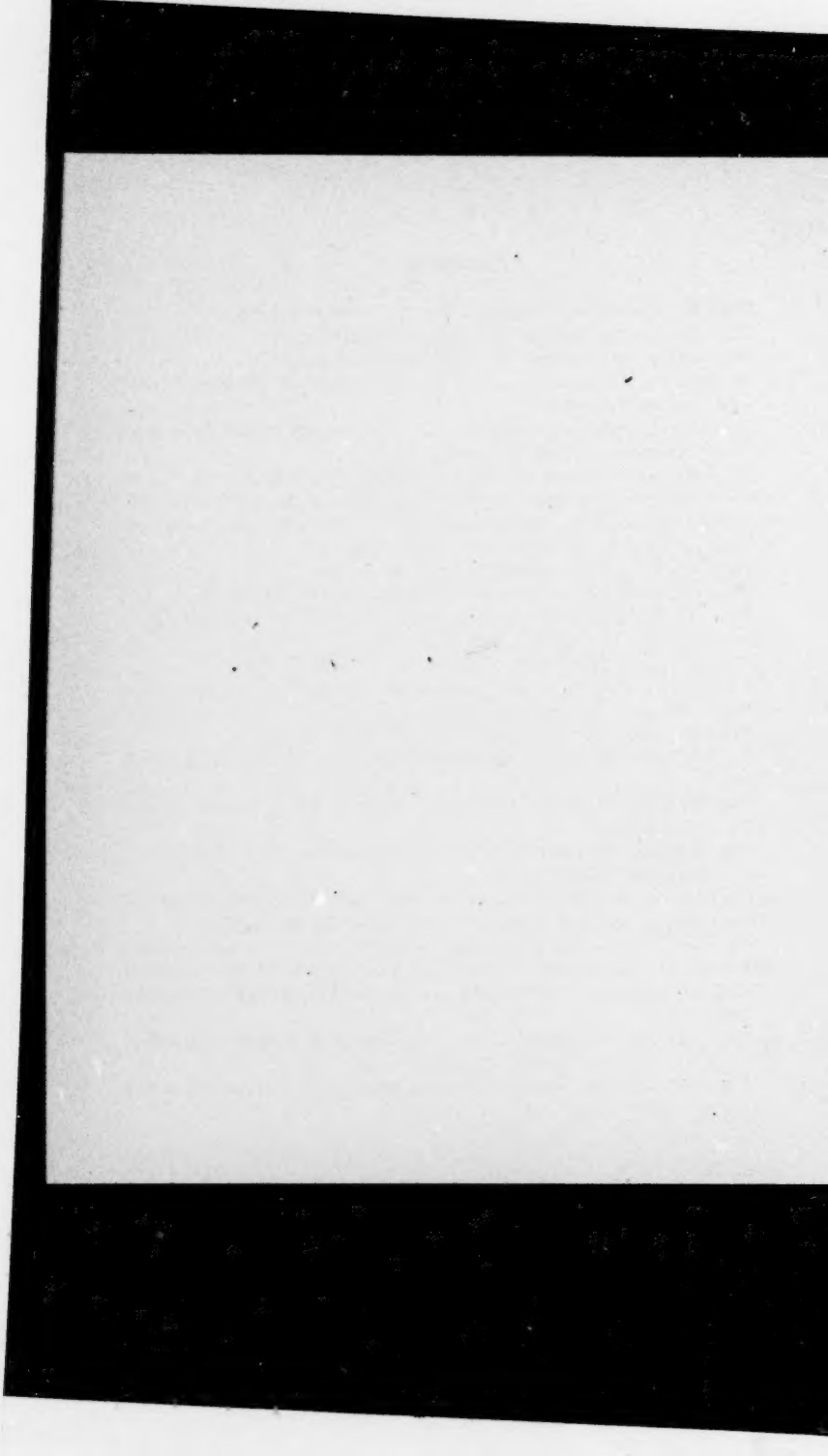
Page 1, Line 3, omit comma after the word "highest."
Page 25, Line 4, insert "h" in word "forthwith."
Page 29, Line 6, insert "b" in word "established."
On page 30, Assignments 5 and 6 are confused in printing. They should read as follows:

5. Error in refusing to adjudge the question as to the admission of incompetent and irrelevant testimony.

6. Error in refusing to adjudge whether Fayette Circuit Court erred in refusing to give instructions involving an INTERSTATE Commerce passenger's rights asked for by plaintiff, and failure on its own motion to give the like instruction, etc.

Page 31, Line 21, "rights" should be "right."
Page 35, Line 10, "e" in Interstate should be capital E.
Page 41, Line 17, period after "Law" should be omitted.
Page 48, Line 24, "inf" should be "ing."
Page 51, Line 27, "must" should be "might."
Page 54, Line 6, "garnted" should be "granted."
Page 57, Line 26, "nto" should be "not."
Page 60, Line 24, "no where" should be "nowhere."
Page 62, Line 30, insert semi-colon at end of line. Line 31, omit "that."
Page 64, Line 14, "says" should be "say." Line 23, insert "of" after "disposing."
Page 65, Line 17, omit "l" in "miscarriage." Line 21, "Savvinet" should be "Sauvinet."
On page 68, line 10, should be omitted, and the following inserted "done this, it inflicted great injustice upon the plaintiff, thus."
On page 72, line 11, the words "under the law" should precede the words "of Kentucky." Between lines 13 and 14 the following should be inserted: "which the jury found for defendant, thereby directly"
Page 73, Line 20, comma after "passenger" should be semi-colon.
Page 74, Line 4, "sees" should be "see."
Page 75, Line 22, insert semi-colon after "2." Line 23, insert "Court" after "this".

had fully and legally heard and examined into and adjudicated it, according to the established and funda-



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

J. ALEXANDER CHILES.....Plaintiff in Error.

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.....Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in Error, J. Alexander Chiles, a Negro, citizen of Lexington, Kentucky, now comes to this, the highest, Court of Justice, in the United States, on a Writ of Error to the Court of Appeals of Kentucky, the highest Court in said State, based on the ground that the judgment of said Court of Appeals denies to him his rights, etc., specially claimed and set up in his petition and proved by the evidence as an INTERSTATE commerce passenger, also it further attempts to finally dispose of his case, presented in the record, before it had fully and legally heard and examined into and adjudicated it, according to the established and funda-

mental law and common justice, thereby, by said judgment, without due process of law, denies his rights, and deprives him of his property (railroad fare), contrary to Paragraph 3, Section 8, Article 1; Section 1, Article 14, Amendments of the Constitution and laws of the United States.

Hence he now comes to this tribunal of justice, seeking relief: therefore, he humbly beseeches this Honorable Court, now composed both of venerable and grey-headed sages, well and long versed in the administration of justice: also young and consecrated jurists, just entering upon the administration thereof, in this tribunal, to patiently bear with him, attentively listen to his cause, and duly inquire thereof, as we proceed in as succinct a manner, as is possible, under the circumstances, to state the facts, cite the law, and make the argument, in order to enlighten more fully your minds as to his contention. Then, after such, if this Court find that he has not specifically set up and claimed his right, in proper time, as an INTERSTATE commerce passenger, necessarily a Federal question, nor has been denied said right, nor has been fully heard, then we say, deny the relief asked for; but, if, on the other hand, after such, this Court find that he did specifically set up and claim his right thus, and it has been denied him, or that he has not been fully heard, according to the established and fundamental law and common justice,

then we say, grant the relief he seeks, and mete out justice to him, with the ten millions (10,000,000) more of his race, whose rights, as citizens traveling among the states are involved with his in this controversy.

On April 11, 1904, Plaintiff in Error instituted in Fayette Circuit Court, Kentucky, a suit for Ten Thousand ($10,000.00) Dollars damage, against the Defendant in Error, the Chesapeake and Ohio Railway Company, a corporation, and filed his petition, expressly claiming and clearly setting forth his rights as an INTERSTATE commerce passenger, and breach thereof, in words as follows, to-wit: (Record, pages 1 and 2).

> "The plaintiff, J. Alexander Chiles, says that the defendant, Chesapeake and Ohio Railway Company, is a corporation duly incorporated by law, and is now and was at the times hereinafter stated engaged in operating a line of railroad from the City of Louisville, in the State of Kentucky and the City of Cincinnati, in the State of Ohio, to the City of Washington, in the District of Columbia, and was then and is now a common carrier, engaged in transporting passengers for hire, in its cars over said line of railroad; that on the 12th day of April, 1904, the plaintiff purchased from the defendant corporation at Washington, D. C., for the sum of Fifteen Dollars ($15.00), which he then paid to the defendant, a first class railroad ticket from Washington, D. C., to Lexington, Kentucky, and under said ticket, he being an INTERSTATE commerce passenger, was entitled to ride continuously, in a first class car on defendant's line of railroad from Washington, D. C., to Lexington, Kentucky.
>
> "Plaintiff states that he boarded the train of defendant's cars at Washington, D. C., and was ac-

cepted by defendant, as a passenger for such, and assigned to a seat in a first class car, upon delivery to defendant of his ticket, entitling him to such first class passage; Plaintiff says that the defendant, after accepting his fare, conveyed plaintiff as a first class passenger in defendant's first class coach, to Ashland, Kentucky, but upon arriving at Ashland, Kentucky, the defendant declined and refused to further carry this plaintiff as a first class passenger in defendant's first class coach, but contrary to plaintiff's contractual rights, and against the consent of plaintiff, the agents and employes of the defendant corporation, called to their assistance a police officer, and by threats of violence and by force and violence ejected plaintiff from said car, greatly to the mortification of plaintiff and to his public humiliation, thereby subjecting the plaintiff to intense mental suffering, and to his damage in the sum of Ten Thousand Dollars ($10,000.00), for which amount he prays judgment against the defendant, and for his costs herein expended and for all proper relief."

On May 8, 1905, (not 1906 as in the Record), Defendant in Error filed its Answer (Record, pp. 3 and 4) denying affirmative allegations of said Petition, and, in addition thereto, alleged other facts, among them the following words:

"Defendant further says, under the rules and regulations adopted by it, colored persons are and were then within the territorial limits of the State of Kentucky in other coaches than those in which white passengers are carried, and that there is and then was no difference or discrimination in the quality, convenience, or accommodation in the cars or coaches set aside for the exclusive use of the two respective races, and that there was no difference or discrimination between the car from which

plaintiff was required to remove and the car into which he was required to remove on the occasion referred to," etc.

May 22, 1905, plaintiff filed General Demurrer, November 27, 1905, Fayette Circuit Court overruled said Demurrer; plaintiff excepted and objected. (Record p. 4) December 11, 1905, he filed reply (Record p. 5), as follows, to-wit:

"The plaintiff for reply to the second paragraph of defendant's answer says he has no knowledge or such information as enables him to form a belief that the car into which the plaintiff went at Ashland, Kentucky, for the purpose of being transported to Lexington was under the rules or regulations of the defendant set apart exclusively for the transportation of white passengers. He denies that the car into which he was requested by defendant's conductor at Ashland, Kentucny, to go into was a first class car, or equal in quality, convenience or accommodation to the other first class cars of the defendant, or to that in which the plaintiff then was. He says that force and violence were used in effecting his removal from the one car into the other, and that he was mortified, humiliated and subjected to mental suffering by the said removal. He admits that he was transported from Ashland to Lexington, Kentucky, in a car set apart for the exclusive accommodation of colored persons, but he denies that he was transported as a first class passenger, or in a first class car. He says that there was then and is now a difference and discrimination in the quality, convenience and accommodations in the cars and coaches set aside by the defendant corporation for the exclusive use of the white and black races and that there was a difference and discrimination between the car from which plaintiff was required to remove and the car into

which he was required to remove on the occasion referred to and that the car into which he was removed was not equal either in quality or in accommodations to the car from which he was removed."

After repeated assignments, finally, May 22, 1906, parties appeared, the jury appeared, was composed wholly of white citizens, and trial was then had on the issues joined, between Plaintiff in Error and Defendant in Error.

All the evidence introduced, is found (Record pp. 19 to 45 inclusive). To arrive at a fair presentation, it is indispensably necessary here to state, the substance of the evidence, to see and ascertain whether or not plaintiff proved his claim, or thereby warranted and justified an instruction on the phase of his contention and right as an INTERSTATE commerce passenger.

Plaintiff's evidence (Record pp. 19 to 28, inc.): Examined by Col. John R. Allen.

"Citizen of Lexington, of Negro blood, a graduate of the Department of Law, University of Michigan, active practitioner, residing at Lexington, Kentucky, who was returning from New York City, where he had been on legal business, and purchased a first class ticket for Fifteen ($15.00) Dollars, at Washington, D. C., April 12, 1904, for continuous first class passage therefrom to Lexington, Kentucky, on defendant's line of railway, boarded train at Washington, and rode continuously first class passage thereon to Ashland, Kentucky. At Ashland, Kentucky, he, with other passengers, was required by the defendant to change cars for Lexington,

Louisville, and other points. He, with other passengers, started to go into the car, and he was spoken to by the brakesman, who said 'go into the front car,' 'colored passengers in the front car.' He informed the brakesman that he was an INTERSTATE commerce passenger Brakesman, making no further objections, he went on into the car. After he arranged his baggage and was comfortably seated, the conductor (Mr N. Ridgeway) came and said 'you will have to go in the front car.' He thereupon informed the conductor that he was an INTERSTATE passenger, did not think the law applied to him. The conductor replied, 'well, you will have to go in there.' He replied, 'no, sir, I am an INTERSTATE passenger, I do not think that law applies to me; I bought a first class ticket.' Conductor replied, 'you won't go?' He said, 'no,' he demanded his rights. Then the conductor went out; came back with short-set gentleman; several white people in the car. Afterwards, while sitting reading the paper, the conductor with the gentleman came to him and said, 'you will have to go out of this car.' He replied, 'pardon me, I told you before I am an INTERSTATE passenger, and entitled to first class accommodations,' offered his ticket, and he then took it and read it and gave it to the other gentleman and said—no, he did not get the ticket clear in his hand,—and the gentleman with him said, 'you will have to go into the other car.' He said he was an INTERSTATE passenger, a lawyer, knew his rights, and that the law did not apply to him, and does not apply to INTERSTATE passengers. By that time the conductor beckoned the policeman; policeman came from the rear. There were four or five white men coming in from the street, and he thought the brakesman was with them. He stood in the gangway there, and he was about five feet from him and the conductor and gentleman with him at his rear (next seat). Policeman came up and said, 'young man, you will have to move in the front car.' He said, 'why?' Police-

man said, 'you will have to go in where the colored passengers go.' He said he was an INTERSTATE passenger. Policeman said, 'I will have to obey my orders,' did not make any difference whether INTERSTATE passenger or not. Plaintiff said that he would not voluntarily move out of his seat. Policeman then said, 'come on,' touching him, took his baggage, said, 'follow me,' and plaintiff said, 'all right, sir, I will go.' He himself took the remainder of his baggage and obeyed orders, following him into the compartment car. The first compartment, and next to the first class car, out of which he was compelled to move, was smoking department for white people, where some men were then smoking. Next is middle compartment for smoking for colored people; nobody was in it. And the third is the compartment intended for first class colored passengers. This is the end next to the baggage car. (See diagram, Record p. 28). The last compartment was materially different from the car out of which he was compelled to move. It had no place for washing face and hands, nor towel with which to wipe them; had only one closet, same for use of both men and women; that both tobacco smoke and smoke from the engine came into it, and that he himself was not a smoker."

Defendant introduced conductor, W. Ridgeway, (Record pp. 28 to 41 inc.), testified in substance:

Examined by Mr. John T. Shelby.

"Conductor of Chesapeake and Ohio Railway sixteen years, had charge of what is known as No. 23, runs from Ashland to Lexington, at the time of the occurrence. 'I was getting my orders preparatory to leaving Ashland before the train started from there, and my brakeman called my attention to the fact that a colored man had gone into the white coach. I went in and requested the gentleman to go in the compartment set aside for his race

by the Statutes of Kentucky. He refused to do it —requested that I force him out of the car—and then I went to the Superintendent's office to ask advice. He in turn went to a lawyer's office, and came back and instructed me to have the gentleman go in the compartment set aside for the colored race. I then went in the coach and again requested him to go out, and he refused, and I said I would have to have an officer. I called an officer and asked him to escort the gentleman to the compartment, and he reached the grip, and when he got up said that is all he wanted before he went over. Well, he said he was a lawyer and he knew the law. I told him I could not help that, that the statutes were laid down and the regulations were such that I, as a conductor, was subject to a fine, that it was the rules and regulations of the road as well as the laws of Kentucky, compelled me to have him ride in the compartment set aside for colored people. He said he was an INTERSTATE passenger. I called the officer; he walked up and caught hold of the suit case belonging to the gentleman, and he said, 'that is all I wanted.' I think the officer said, 'you will have to go in the other car.' That is about all; I cannot say word for word what he said. The officer did not touch him; the officer had suit case in each hand. Mr. Chiles took up his overcoat, slung it across his arm, and followed him. No rough language was used by me or the officer. There was combined express, baggage, and mail car, and then two coaches, then the sleeper. The car into which he went is next to the sleeper, the third car from the front, set aside and reserved for the white people, with a sign on it; ladies and gentlemen both in there. The car into which he went had three compartments. The rear compartment is used as white compartment, the front is used as a colored compartment, and the middle—there are two partitions across the car—that is used for colored smoking room. The car left Louisville on train No. 24, April 12th, on which I was conductor, and

got to Ashland at 12:25 the next morning. It remained at Ashland. It was cleaned when I received it, the same as any other car on the train, except the sleeper, which gets there from New York. There is an addition to this car, two partitions, which is the only exception to the car that I have described before; two uprights shutting the car off, which does not interfere with the passengers in any way, shape, or manner, except divide the colored people from the smoking part. It has toilet room, wash stand, towel, etc. The partitions were put in after the car was in service. I ran the car as a car without partitions. After the law had been passed, there was one partition put in, and I myself wrote a request to have the second partition put in to allow a smoking department for colored people. The rule of the company or instruction was, when the law was passed, we were to separate the colored and white races without reference as to whether they are INTERSTATE passengers or not (Record p. 40). The car runs from both directions; not turned round."

Cross-Examined By Col. C. J. Bronston.

"About one-half compartment car was set apart for white people. That the white people had first class accommodation, another coach, both ladies and gentlemen. Do not allow ladies to go into the smoking department for white people, unless they wanted to. That the newsboy kept his books and stuff in the compartment used by the colored people. Newsboy used about two benches of the compartment occupied by colored people for his papers, candies fruits, etc. Tin cup in there for drinking purposes, one toilet. Mr. Chiles told me he was an INTERSTATE passenger. When he told me that, I understood him to mean the same as anybody, that comes from out of the State. He said he knew his rights and wanted to be protected. I understood that he meant the same as anybody that came from out of

the State. We had instructions to separate the races, and when I went for advice, I simply went for advice because I wanted to know of the occasion if I was wrong, I wanted to be instructed on it. Did not know that the courts had decided as to our road that the law did not apply to INTERSTATE passengers. There was quite a crowd around the depot, same as always. The policeman did not go in with me; he went in the other end. Four or five bystanders did not go in at the same time with me; only employes of the company, trainmaster's clerk and brakeman. Do not know why the trainmaster's clerk came in. Brakeman had no connection with the train, but was in the passenger service. Cannot say whether the brakeman came in at the other end. The trainmaster's clerk and myself did. It was not arranged with the policeman outside that part of us would go in at one end, and one at the other. It was arranged with the policeman, if I needed him, to be within call; simply wanted him to be on hand. If he is not on hand, I have to act as officer myself. When I went to Mr. Chiles the second time, I asked him if he still refused to vacate and go in the compartment set aside by the State of Kentucky. I said, 'do you still refuse to go in the compartment set aside by the State of Kentucky,' just in the ordinary way, and he said, "I am an INTERSTATE passenger, I know my rights, and I am a lawyer, and you have to force me.' I said, 'you refuse'? He said 'I do." I called the officer, and he came, and I said, 'escort the gentleman to the compartment set aside for his race.' He was sitting in the center, or possibly two seats ahead of the center, was not in a seat with a lady nor in a seat with a white man. He was sitting there reading. . Did not see anything lacking in neatness in his appearance. His satchels were clean. I got his ticket; noticed it was ticket carrying him from Washington to Lexington. Did not notice it read first class, but I knew it was first class ticket. Did not know anything about the ticket. He could pay

his fare, or give me his ticket. I was just moving him out of the car on account of his race. That was the only reason. I indicated to the policeman where to take him, to the compartment set aside for his race by the State. I did not see anybody come there in that car. The front end of the car going from Lexington (to Ashland) used for colored people. The white people use either end of the car interchangeably for smoking purposes (depending on the direction it is going).

Defendant introduced Brakeman R. J. Brown (Record pp. 41 to 45 inclusive), testified in substance as follows:

He was standing with his back to the sleeper, helping passengers on the train, when this gentleman (meaning plaintiff) came up. He took hold of his arm as he stepped on the step, and told him, take the car ahead, please, and he went on right in the coach, and I told the conductor. Well, I was standing between the "smoking department" and what we call the "Ladies' coach." Only had two coaches on the train. I was standing between the two coaches standing by the steps at the rear of the "Ladies' coach." Did not hear any conversation between him and the conductor; did not go inside. Compartment car used for colored people is coach built just the same as the other coach, with the exception with partition between them. The front portion used for colored passengers, the rear portion for smoking department (white passengers). The coach is exactly the same as the other, with the exception of two partitions in the middle, making smoking room for colored passengers. Why I called one "Ladies' coach" and the other "Smoking coach" is that no ladies ride in the smoking end of the front car; it is used for smoking room. Yes, first one end and then the other for a smoking room, depending on the way we are going. Yes, one end as we go up and the other end as we come down, as smoking room.

Car has a toilet room, wash basin at one end. Do not remember whether wash basin was in toilet room or outside of it.

Stenographic report was taken of the proceedings. At the close of all the evidence introduced on both sides, the plaintiff asked the Court to give the four instructions (Record, p. 15), embodying his rights specially claimed and set forth, in his petition, and proven by the evidence, as an INTERSTATE commerce passenger, to-wit:

1. It being admitted, by the pleadings that the plaintiff did purchase a first class ticket from Washington, in the District of Columbia, to Lexington, in the State of Kentucky, the Court instructs the jury that at the time he was removed from the coach he was riding in, from Washington to Ashland, to the colored coach at Ashland he was an INTERSTATE passenger; and the Court further instructs the jury that the defendant had no right to compel the plaintiff to remove from the one coach into the other; and if the jury believe from the evidence that the defendant's employes, agents, or servants, by the use of force or by threats, or menace, or force, or by duress, compelled the plaintiff to move at Ashland, Kentucky, from the car in which he had ridden from Washington into the coach set apart exclusively for colored passengers, they should find for the plaintiff such damages as he may have sustained by reason thereof.

2. In estimating the damages, the jury may take into consideration any humiliation or shame and any distress of mind occasioned by said removal.

3. The jury are instructed to find for the plaintiff and to fix his damages at such sum as will compensate him for any distress of mind, or any shame or humiliation caused by reason of the removal of plaintiff from one of said cars to the other.

4. The Court instructs the jury that the defendant had no right to eject the plaintiff under any rule or regulation requiring white and colored passengers to ride in separate coaches unless at the time the plaintiff purchased his ticket notice was given to plaintiff of the existence of such rule or regulation.

Said instructions offered by plaintiff, the Court refused to give; to which ruling plaintiff duly excepted. Defendant asked Court to give instructions A, B, and C (Record, p. 16). Same were refused. Then, the Court, of its own motion, over the objection and exception of plaintiff in error, ignoring each and all of the instructions, embodying the rights and contention of plaintiff in error, as an INTERSTATE commerce passenger, and declined to give any like instruction, but then gave to the jury instructions 1, 2, and 3 (Record, pp. 16 and 17), to-wit:

1. Unless the jury believes from the evidence that the defendant, the Chesapeake & Ohio Railway Company, when, through its agents, it ejected the plaintiff, J. Alexander Chiles, from one of its coaches, and required him to go into another of its coaches, had a rule or regulation, and that said rule was reasonable, by which colored persons were required to ride in a coach different from the coach ridden in by white persons, and, further, that the coach to which said Chiles was required to go was a coach substantially equal to that which he had been required to leave, in convenience, comfort, and safety, the jury should find for the plaintiff.

2. If the jury believe from the evidence, that the defendant had a rule or regulation by which colored persons upon its trains should ride in separate

coaches from the coaches in which white passengers rode, and that said rule or regulation was a reasonable rule or regulation, and, if the jury further believe from the evidence that when defendant ejected plaintiff from the coach in which he was sitting and required him to go into another coach, it did so under such rule or regulation; and if they further believe from the evidence, that the coach in which the plaintiff was required to ride was substantially equal in convenience, comfort, and safety to that which he had been required to leave, and that it was a coach set apart for the use of colored passengers, the jury should find for the defendant.

3. If the jury find for the plaintiff, they should find for him in such sum in damages, not exceeding Ten Thousand Dollars, as will fairly compensate the plaintiff for any injury done him by being ejected from one of defendant's coaches, and being required to ride in another coach, and in estimating the damage done to plaintiff, if any, the jury may consider any mortification or humiliation of the plaintiff, if any, resulting from being so ejected from one coach, and required to ride in another coach.

After argument by counsel, the jury retired, and afterwards returned into Court the following verdict:

"We, the jury, find for the defendant."

Same being signed by only nine of the twelve jurors, to-wit: B. C. Prewitt, J. M. Hedges, H. M. Skillman, George Land, L. J. Fallon, R. H. Wilson, T. W. Berkley, W. P. Hughes, Garrett Watts, but A. B. Lancaster, M. T. Lyle, and F. R. Davis, of the jury, declined to sign such unjust verdict.

May 23, 1905, the plaintiff duly filed motion, etc., for new trial (Record, p. 7), in substance as follows:

> Because the verdict was contrary to the law and the evidence, and not sustained by the evidence. The Court admitted incompetent and irrelevant testimony against plaintiff, etc., and refused to admit competent and relevant testimony in his behalf, etc. That it gave to the jury improper, misleading, and erroneous instructions, and refused to give to the jury the instructions asked for by plaintiff, embodying his rights as an INTERSTATE passenger. Because the verdict was the result of bias and prejudice against plaintiff growing out of his assertion and prosecution of his cause.

The Kentucky Code of Practice, Chapter 2, Title 9, Article 5, New Trials, Section 340, provides:

> The former verdict or decision may be vacated and a new trial be granted on application of the party aggrieved, for any of the following causes affecting materially his substantial rights:
>
> 1. Irregularity in the proceedings of the Court, jury, or prevailing party or any order of Court or abuse of discretion, by which the party was prevented from having a fair trial.
>
> 6. That the verdict or decision is not sustained by sufficient evidence or is contrary to law.
>
> 8. Error of law occurring at the trial, and excepted to by the party making the application.

Section 342:

> The application for a new trial must be made at the term at which the verdict or decision is rendered, etc.

After argument by counsel on motion and filing of briefs, the cause was soon thereafter submitted, and, later, July 26, 1906, Judge Watts Parker, of said Circuit Court, in a written opinion (Record, pp. 8 to 13), over-

ruled said motion, to which ruling plaintiff duly excepted, and forthwith prayed appeal therefrom, to the Court of Appeals, the highest Court of Justice in Kentucky, which was granted.

Among other things, in delivering his opinion, the learned trial Judge said:

> "The facts appearing from the evidence in the case are not complicated. It appears clearly that at Ashland, defendant, in changing cars, offered to go into the white coach, and was notified by one of defendant's employes that he had no right to enter said coach; that the plaintiff thereupon informed this employe that he, the plaintiff, was an 'INTERSTATE passenger,' and had the right to ride in the white coach, and thereupon entered that coach and took his seat. It appears that he was afterwards requested to leave said car, but refused to do so until the employes of the Company demanded that he should quit the car, and that, too, in a manner, and with such a display of force that it was apparent that plaintiff would be obliged to comply. There is no evidence whatever that any force was actually applied to the person of the plaintiff. There is some evidence to the effect that a policeman, acting under defendant's orders, laid his hand upon plaintiff's shoulder, but, during the entire transaction, from its beginning to its end, there was no unlawful force used against plaintiff, unless it be that the demand that he should leave the car, backed by the power to force a compliance, be held an unlawful violence.
>
> The plaintiff, in his conduct, was guilty of no rudeness, but all the facts show that it was a plain case of a demand on the part of the plaintiff, that he should be permitted to ride in the white car—a demand of the defendant that plaintiff should ride in the other car—and a threat on the part of defendant that if he refused to leave the white car, he would

be ejected therefrom. No physical injury whatever was done t othe plaintiff.

The question here presented is whether or not a railroad company may lawfully require that its white and colored passengers shall ride in separate coaches, or whether a member of either race shall have the right to demand that he shall be allowed to ride in the same coach with the other race, irrespective of the accommodations tendered him in a separate coach.

This case has been tried without regard to the Kentucky Statute requiring separate coaches for the two different races.

The defendant seeks to justify, not under a statute of Kentucky, but under its right to regulate by reasonable rules the transportation of its passengers. It claims that it had a rule by which the two races should be required to ride in separate cars, and that under this rule, it required the plaintiff to ride in a car set apart for members of his race, which the defendant asserts was in all respects as good as that assigned to white passengers.

The plaintiff, during the progress of the trial, in strict compliance with the Kentucky Code of Practice, duly excepted to each and all the rulings of the Court, adverse and prejudicial to, and subversive of, and affecting his substantial and material rights.

Chapter 2, Title 9, Article 4, on Exceptions, which provides:

> An exception is an objection taken to the decision of the Court upon a matter of law, etc.

Section 334:

> The party objecting must except when the decision is made, etc.

Section 335:

No particular form of exception or bill of exceptions is required. The party must not, except as hereinafter provided, state the evidence, but must state the material facts which the evidence conduces to prove; and if the exception be to a decision admitting or excluding testimony or concerning its meaning or effect, so much of the evidence as is necessary to explain the exception and no more shall be stated. * * * If the party wish to appeal upon the ground that the verdict is not sustained by the evidence, it shall be stated in full, and the bill of exceptions be presented to the judge.

Section 337:

The party excepting shall, unless further time be given him, prepare his bill of exceptions, which shall include all the decisions of the court excepted to in consecutive order, and if he except to a decision of the court in granting or refusing any instructions, all the instructions given and refused shall be also included. If the bill of exceptions be approved by the judge, he will sign it, and it shall be filed as a part of the record, etc.

Section 338:

No exception shall be regarded unless the decision to which it relates be prejudicial to the substantial rights of the party excepting.

Section 339:

In case in which by subsection 2 of 335, the evidence is required to be stated in full, the judge shall certify in the bill of exceptions that it contains all the evidence.

As the defendant, in its evidence, states that it ejected plaintiff from the car to comply with the Kentucky law and rule of the Company, it becomes now indispensably

necessary to quote the Separate Coach Law, enacted by the State of Kentucky, Kentucky Statutes, to-wit:

Section 795. SEPARATE COACHES OR COMPARTMENTS FOR WHITE AND COLORED PASSENGERS.

Any railroad company or corporation, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indictating the race for which it is set apart.—Act, May 24, 1892.

Section 796. NO DISCRIMINATION IN COACHES OR COMPARTMENTS.

That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.—Act, May 24, 1892.

Section 797. MISDEMEANOR—PENALTY.

That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of sections seven hundred and ninety-five and seven hundred and ninety-six shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.—Act, May 24, 1892.

Section 798. JURISDICTION OF CIRCUIT COURT.

That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.—Act, May 24, 1892.

Section 799. DUTIES AND POWERS OF CONDUCTORS OF TRAINS.

The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such pasenger off of the train. And for such refusal or putting off the train, neither the manager, conductor, nor railroad company shall be liable for damages in any court.—Act, May 24, '92.

Section 800. PENALTY IMPOSED ON CONDUCTORS FOR VIOLATION OF DUTY.

That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of section seven hundred and ninety-nine shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.—Act, May 24, 1892.

Section 801. PERSONS TO WHOM ACT NOT APPLICABLE.

The provisions of this act shall not apply to em-

> ployes of railroads or persons employed as nurses, or officers in charge of prisoners [nor shall the same apply to the transportation of passengers in any caboose car attached to a freight train]. (Words in brackets added by amendment.) Amd. March 15, 1894.

He then prepared, filed, and submitted his Bill of Exceptions, embodying all the proceedings of the Court, including, as aforesaid, the stenographic transcript of the case, in the Kentucky Court of Appeals, February 15, 1907 (Record, p. 46).

Afterwards, on April 16, 1907, said Court of Appeals, in a written opinion, compiled by Mr. Carroll, Commissioner of said Court, although it had not fully and legally heard and adjudicated the many different errors of law properly, manifestly, and affirmatively, presented in the record, yet it wrongfully and illegally affirmed the judgment of the Fayette Circuit Court (Record, pp. 46 to 53 inclusive).

In this opinion, among other things, said Court of Appeals stated:

> A reply was filed, controverting the affirmative matter in the answer, and upon a trial before a properly instructed jury a verdict was returned for appellee.
>
> There is really no material issue of fact involved in the case. No force or violence, or rude or oppressive conduct, was employed by the agents of appellee in removing appellant from the car in which he was seated to the car set apart for colored persons. And except that the car into which he was removed is

divided by partitions into three compartments, it was substantially equal in quality, convenience and accommodation to the car into which he first seated himself, and the compartment into which appellant was directed to go was cleanly and ample for his accommodation, and equipped with the same conveniences as the other passenger coach on the train from which he was ejected. It is admitted that sections 795-801 of the Kentucky Statutes, requiring all railroad companies to furnish separate coaches for transportation of white and colored passengers and imposing upon the company and conductors a penalty for refusing or failing to carry out the provisions of the law, does not apply to appellant, who was an INTERSTATE passenger; it being conceded that the statute is only operative within the territorial limits of this State, and effective as to passengers who travel from one point within the State to another place within its border. The question presented for our consideration is, has a common carrier, such as a railroad company, the right, independent of the Statute, to establish reasonable rules and regulations for the transportation of passengers, and to establish such rules and regulations as will require white and colored passengers, although they may be INTERSTATE, to occupy separate coaches or compartments upon the train. To put it in a simpler form, and one that will present squarely the issues involved, has a railroad company, within this State, independent of any statute, the right to adopt and enforce rules and regulations requiring colored passengers, although they may be INTERSTATE, and solely because of their color and race, to occupy coaches or compartments in coaches separate and distinct from those occupied by white persons? Both of these queries must be answered in the affirmative. A passenger who purchases a ticket entitling him to transportation on a railroad, and who conducts himself properly, and is not laboring under any mental or physical infirmity or disease that would render it unsafe, improper or dangerous to carry him, has the right to

> demand that the carrier shall furnish him with accommodations and conveniences substantially equal to those given to other passengers holding similar tickets. But, subject to these qualifications, a railroad company may adopt and enforce reasonable rules and regulations for the transportation of passengers, such as requiring that those who smoke shall occupy a certain car or compartment, or that gentlemen not accompanied by ladies shall take a car other than the one set apart for the exclusive use of ladies. Many other regulations not here necessary to mention may be made; the rule being that the passenger takes his ticket with the understanding that he will conform to all the reasonable regulations of the carrier as to the conduct of the carriage, it being understood and recognized as the law that the carrier assumes the responsibility of the reasonableness of the regulation, and if it should be held unreasonable the carrier will be liable in damages to the passenger against whom it was enforced.

After stating that both these above propositions must be answered in the affirmative, and in support of same citing Federal authorities, it concludes its opinion thus:

> It will thus be seen that the principal matter to be considered in cases of this character is not the color of the passenger, but whether or not he has been furnished accommodations substantially equal in quality, convenience, and comfort to those holding similar tickets. This issue was fairly submitted to the jury by the instructions of the court, and their finding was, in effect, that no discrimination was made against appellant in respect to the accommodations furnished him.

The judgment of the lower court must be affirmed.

But discovering by comparing the opinion, with the record in his cause presented, that said Appellate Court

had not fully heard and considered the errors of law in the records, or presented by him, according to common justice, and established, fundamental principles of law, he fortwith, on May 16, 1907, filed his petition for rehearing (Record, pp. 53 to 60 inclusive), expressly, affirmatively, unequivocally, and clearly therein calling and directing the attention of said Court to the various errors of law, properly couched in the record, he had legally presented and submitted in his Bill of Exceptions for adjudication, which had not been duly disposed of in said decision, to-wit:

> Whether or not trial court erred in admitting incompetent and irrelevant testimony against him, and excluded and rejected competent and relevant testimony for him. Whether it erred in refusing to give instructions asked for by him, involving his rights as INTERSTATE commerce passenger, and omitting to couch the like or substantial instruction in its own instruction given to the jury. Whether or not it erred in giving improper, misleading, and erroneous instructions. Whether the verdict was contrary to the law and evidence, or was the result of bias and prejudice. Whether it erred in overruling the motion for new trial (Record, pp. 53 to 59, inclusive).

The relevant and competent testimony excluded (Record, pp. 19 to 22 inclusive):

> Q. 6. For what purpose?
> Q. 14. Was there any interference with you in going through the State of Virginia?
> Q. 31. You heard Mr. Shelby's statement, that your complaint was that you were put from the white

2. Whenever a case involves a constitutional question, either Federal or State, or in any case, where, in the opinion of the Chief Justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved, etc.

13. Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case.

17. There shall accompany every brief a classification of the questions discussed, etc., * * * and the authorities relied upon shall be cited under appropriate head.

The Appellate Court, although it had not in its opinion either affirmatively or negatively considered, mentioned, or disposed of said errors of law, duly excepted to by plaintiff, and presented to it, for adjudication, as it was legally encumbent upon it to do, even after plaintiff had expressly called its attention to the omission thereof, in the petition for rehearing, yet said Court thereupon deliberately and intentionally attempted to dispose of the said cause involving the rights of an INTERSTATE commerce passenger, by entering an order, May 24, 1907 (Record, p. 60), to-wit:

> "The Court being sufficiently advised, it is considered that the motion and petition of appellant for a rehearing herein be and the same is hereby overruled."

Thus, on appeal, the judgment of the Fayette Circuit Court was finally affirmed by the Appellate Court, the highest Court of Kentucky, and this, too, before it had

legally examined and inquired into, and fully heard and adjudicated, the errors of law complained of, affirmative ly and expressly stated and presented in the record and Bill of Exceptions by said Plaintiff in Error, thereby denying and depriving him of his rights not according to common justice and the estalished and fundamental law and without due process of law.

Seeing that we have no power or might against such unkind, unjust and illegal treatment, and recognizing and knowing that there be higher than they (Eccl. 5:7), therefore we do lift our eyes to Him, from whom cometh our help (Ps. 121), and resolve to deal courageously (2 Chro. 19:11), knowing that He will be with the good, and do now fix our eyes, and call upon the God of Justice, and this Court (2 Chro. 20:12) to right the great wrong and injustice inflicted; for this purpose this Writ of Error is prosecuted.

ASSIGNMENT OF ERRORS.

The errors assigned in this cause are found on Record pages 60 to 62, inclusive, are in vitality and importance only three, yet are presented under eleven different heads, in substance, to-wit:

1. Error in overruling motion and grounds for new trial, etc.
2. Error in refusing to reverse judgment on account of its ruling upon said motion committed against plaintiff at the time of the trial, involving his

rights as INTERSTATE commerce passenger, etc.

3. Error in adjuding that the Chesapeake & Ohio Railway Company, defendant in error, within the State of Kentucky, independent of any statute, had the right to enforce rules and regulations requiring colored passengers, although may be INTERSTATE, and solely because of their color and race, to occupy coaches or compartments of coaches separate and distinct from those occupied by white passengers, etc.

4. Error in holding that no material issue of fact involved, etc.

whether Fayette Circuit Court erred in refusing to whether Fayett Circuit Court erred in refusing to give instruction involving an INTERSTATE commerce passenger's rights asked for by plaintiff, and failure on its own motion to give the like instruction, etc.

7. Error refusing to adjudge whether said Court gave the jury improper and erroneous instructions.

8. Error in refusing to adjudge question whether verdict for defendant was the result of prejudice and bias, etc., growing out of his assertion and prosecution of his cause of action.

9. Refusing to adjudge and dispose of the Petition for Rehearing, which expressly called its attention to the various errors, etc., in the record, being presented but not having been disposed of.

10. Error refusing to grant Petition for Rehearing, after said manifest errors of law appeared therein, affecting materially the substantial rights of plaintiff, presented but which had not been disposed of according to due process of law.

11. Error in holding and affirming said judgment of said Fayette Circuit Court, before it had legally considered and disposed of every question of law according to common justice and the establishel law and Constitution of the State of Kentucky, and Paragraph 3, Section 8, Article 1, and Section 1, Article 14, of the Federal Law and Constitution of the United States. Each of which said errors of law had been legally raised and ob-

On page 30, Assignments 5 and 6 are confused in printing. They should read as follows:

5. Error in refusing to adjudge the question as to the admission of incompetent and irrelevant testimony.

6. Error in refusing to adjudge whether Fayette Circuit Court erred in refusing to give instructions involving an INTERSTATE Commerce passenger's rights asked for by plaintiff, and failure on its own motion to give the like instruction, etc.

jected and excepted to by said plaintiff at the time decided against him, and legally couched in the record presented to the said Court for its adjudication, and each of which said eleven errors were committed against said plaintiff in error contrary to his rights as an INTERSTATE commerce passenger, etc.

ARGUMENT.

The eleven errors assigned herein for relief, in gravity, vitality, importance, and effect, we have resolved into three, manifestly and incontrovertibly appearing in the record, commencing with the order of Fayette Circuit Court, overruling demurrer of plaintiff, to answer of defendant, and culminating, in and by the affirmance of the judgment of said Circuit Court, by an order of said Appellate Court, overruling petition for re-hearing, before it had duly and fully examined and considered said petition. Therefore we have now narrowed, and compacted all said eleven errors for consideration into three propositions, to-wit:

1. That the plaintiff in error specifically set up and claimed, at the proper time and manner, his rights as an INTERSTATE Commerce Passenger, and that it was, and has been denied him, contrary to the Commerce Clause, Article 1, Section 8, Paragraph 3, of the Constitution of the United States.
2. That neither the State nor the common carrier can enact and enforce laws or rules or regulations contrary to, and subversive of, the right of an INTERSTATE passenger, solely because of his color, or otherwise, independent of, or contrary to, or subversive of, the said Commerce Clause.

3. That plaintiff has not been duly and fully heard, in his contention, according to the fundamental and established law or common justice guaranteed him, either under the Constitution and laws of Kentucky, or of the United States.

We contend that these three propositions necessarily bring before this Court, every error complained of by plaintiff in the record; and if he succeed in establishing even one or all of them, he will be, in our judgment, entitled to the relief he seeks. Therefore from the manifest errors appearing in the record, we confidently believe and earnestly hope, that by and with the law and authority, to indisputably establish, and clearly show that the plaintiff is entitled to said relief.

We have at some length, but not unnecessarily, in our judgment, according to the gravity and importance of the issues involved, requiring us, couched in our statement, as much of the pleadings, evidence, etc., as we considered proper, and conducive to a clear and fair presentation of our contention. Therefore, if it seems long and wearisome, we humbly and respectfully ask this Court to recognize this cause, not only as being vital and important to plaintiff, but also, likewise such to the ten millions and more of his race, now existing, citizens under this great government, who are earnestly hoping, faithfully praying, patiently waiting and firmly believing that this Court will continue to render its judgment to every man according to his cause appearing upon the

whole record presented. (Ps. 62:12. Jeremiah 17:10.)

Knowing, therefore, that this Court does not judge any man, or decide his cause, before hearing it, and knowing what he doeth (John 7:50), from the record presented we proceed to affirm, and expect to prove the truthfulness of all of said propositions. If plaintiff has at the proper time specifically set up and claimed title, right, privilege, or immunity under the Constitution, or law, or treaty, or by virtue of a commission held, or authority exercised by the United States, and the decision has been against his rights, etc., so claimed, he falling within the provisions of United States Revised Statutes, section 709, United States Compiled Statutes of 1901, page 575, governing Writs of Error from the Supreme Court of the United States to State Courts; then, as aforesaid, the relief asked for by him should be granted.

Plaintiff, an American citizen, although a Negro, is now vested with, and entitled to, all the rights, privileges, immunities, etc. granted and guaranteed under the law to all other citizens. True, there was a time when he had not such rights, and when this Court in the memorable Dred Scott vs. Sanford, 60 U. S. 393, decision, in an opinion delivered by Chief Justice Taney, among other things, said:

> "They (the Negro) had for more than a century before been regarded as beings of an inferior order, and, although unfit to associate with the white race, either in social or political relations, and so far in-

> ferior that they had no rights which the white man was bound to respect, and that the Negro might justly and lawfully be reduced to slavery for his benefit."

Yet we are gratefully glad, with this Honorable Court and the world to know, that such a state of affairs has long since ceased to exist, and know with sorrow many widows and orphans attest this fact, and that Article 13 and 14 of the Constitution of the United States have forever, we hope, broken the chains of slavery, and accorded the Negro rights, and guaranteed him equal protection of life, liberty and property with due process of law, as any other citizen of this great government. As such citizen, although the States in concerted action with intra or INTERSTATE commerce common carriers, seek to deprive him of his rights, immunities, etc., thus guaranteed by the Federal law; yet we feel confident that when he has a cause presented to this Honorable Court, in which his rights have been denied, or he has been deprived of his property without due process of law, that this Court will fully hear and duly determine his cause upon the record presented.

Proposition 1. That the plaintiff in error specifically set up and claimed at the proper time and manner his right as an INTERSTATE commerce passenger, and that it was and has been denied him, contrary to the Commerce Clause, Article 1, Section 8, Paragraph 3, of the Constitution of the United States.

The record shows that the plaintiff, a Negro, citizen, active practitioner at law, a graduate of the Law Department of the University of Michigan, residing at Lexington, Kentucky, had been to, and was returning from, New York, on legal business. At Washington, D. C., the capital of the Nation, he purchased of the defendant, a corporation, for the sum of Fifteen ($15) Dollars, a first class railroad ticket, from Washington to Lexington, Kentucky, and under said ticket, he being an INTERSTATE commerce passenger, was entitled to ride continuously in a first class car. At Ashland, Kentucky, he was forcibly ejected, and compelled to move from the first class car into a "smoking car," having "THREE compartments," TWO of which used for SMOKING purposes at the time; the OTHER interchangeably used for smoking purposes, only depending on the way the car goes. He instituted suit for Ten Thousand ($10,000) Dollars damages. He proved, both by his own evidence, and that of the defendant, that he was an INTERSTATE commerce passenger, asserting and claiming, at all times such rights. That at the time he was ejected from defendant's car, by a police officer, under the orders of said company, he persisted and insisted upon his rights as an INTERSTATE commerce passenger.

Not only this, but that after the evidence was all in, he asked the Court to give the instruction presented by him, embodying his contention as such passenger. The

Court refused to give said instruction asked for, and failed to give the like instruction in its instruction; but entirely ignored plaintiff's contention, and gave, to the contrary, improper and erroneous instructions, embodying contention of the defendant.

Plaintiff duly excepted to all the rulings of the Court adverse to him. Among them was "error of the Court refusing to give said instruction asked for by him as aforesaid, involving his rights as an INTERSTATE passenger, and giving erroneous and misleading instructions," etc. The Appellate Court, in its decision, refers to the instructions thus:

> "And upon a trial before a properly *instructed* jury, a verdict was returned for appellee. That the principal matter to be considered is whether he has been furnished accommodations substantially equal in quality, convenience, etc., to those holding similar tickets. This issue was fairly submitted to the jury by the *instructions* of the Court, and their finding was *in effect* that no discrimination was made against appellant in respect to the accommodations furnished him. The judgment of the lower Court must be affirmed."

This is all the reference whatever we are able to discover in the record of the judgment of the Appellate Court, concerning the instructions offered, refused, or given. Hence, from the record, although a Federal question was involved, and specially set up and claimed by plaintiff, an INTERSTATE passenger, both in his pleadings supported by evidence, and couched in his in-

struction asked for, and refused, by the Court, etc., and same duly prepared and presented to the highest Court of Kentucky for decision, on his rights, etc., yet that Court, without legal right, notwithstanding plaintiff had strictly complied with the provisions of the Kentucky Code of Practice, required (see statement) in such matter—it denied him his right and refused to duly consider the record presented not only on this one question of instructions, etc., necessarily involved, affecting materially and substantially his right, but also on several other errors of law, duly presented to it for adjudication.

Can it be said, that after the defendant has testified in SEVEN expressions that he was acting under and by the Statute of Kentucky, and only three expressions that he was acting under and by the rules of the company, that the trial Court can legally release defendant from the proper effect of its testimony, in an instruction, which confines the jury only to the lesser motive of its wrongful act? Can it be said that the trial Court can entirely ignore the preponderate, indisputable testimony of plaintiff, in the action, before a jury, that he was an INTERSTATE passenger, and give to the jury no instruction whatever on the law of the case, embodying his contention? Can it be said that an Appellate Court, with such facts, etc., duly excepted to and brought to and before it, in the record, can legally dispose of such case, without

first having duly considered all the errors of law thus presented to it for adjudication?

In view of such procedure can this be said to be "common justice?" If such a state of facts be found as alleged then it is true that said Court does not regard the basic principle of Justice—one law for both its own people and the stranger (Levi. 24:22), nor is it thereby keeping judgment and doing justice as is required both by Divine and secular law. (Isaiah 56:1, Micah 6:8.)

Plaintiff was an INTERSTATE passenger, and his right as such, without good rule of law or common justice, was flagrantly denied him, contrary to the Commerce Clause and the Constitution of the United States.

Having, therefore, proved this proposition, and believing confidently that this of itself is sufficient to entitle plaintiff to relief sought, nevertheless we proceed to the second.

Proposition 2. That neither the State nor the common carrier can enact and enforce laws or rules or regulation contrary to, and subversive of, the right of an INTERSTATE passenger, solely because of his color or otherwise, independent of, or contrary to, or subversive of the Commerce Clause of Article 1, Section 8, Paragraph 3, of the Constitution of the United States.

> It provides that "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Under this power, February 4, 1887, it enacted a law to regulate commerce between the several States, and established a special Interstate Commerce Commission for the administration of said law; this power being exclusive in Congress; therefore it is clearly apparent that it is beyond the power of any State or corporation, or a common carrier within the State, to enact and enforce any law, rule, or regulation contrary to or subversive of any right of a citizen exercised under that power. Therefore, if any citizen traveling as an INTERSTATE passenger sets up and claims his right at the proper time and in the proper way, in the Court, and that right is denied him, by a verdict or decision of said Court, and the highest Court of that State affirms the decision of the trial Court, thus also denying said right, then the judgment of that Court upon such question entitles the party applying for redress in this Court, where he will be fully heard, upon the record, by writ of error issued from this Court to the said State Court.

As aforesaid, plaintiff was an INTERSTATE passenger, and, as such, although a colored person, a member of the Negro race, yet he was entitled to be accorded all the rights and privileges and immunities accorded to every other citizen traveling as an INTERSTATE passenger.

It is a well established principle that both the State and corporations within the State, granted rights by the

to abridge the rights of an *INTERSTATE passenger* contrary to the Commerce Clause of the Constitution, and also contrary to the interpretation of the Separate Coach Law of the States of Mississippi, Kentucky, and Tennessee? Although the Court in its opinion say that the law is not applicable to an INTERSTATE passenger, yet it says that "this rule of the company extends to *all* passengers, without reference to whether they are *INTRASTATE or INTERSTATE.* Can it be said, then, that such is a reasonable rule?

The language in the opinion of the Appellate Court as to the Separate Coach Law of Kentucky being "effective as to passengers who travel from one point within the State to another place within its border" is not very clear to appellant's mind; but in view of the context, we think it is intended to apply to intra-state passengers, or persons whose journey begins within the State and ends within the State. But it does not so state, because plaintiff, although an INTERSTATE passenger, "traveled *from Ashland, Kentucky,* a point within the State, to Lexington, Ky., a point within its border," although his journey began at Washington, D. C., and ended at Lexington, Kentucky. Yet he was not treated by defendant even as well as an intra-state passenger under the law of Kentucky. Can it be said, then, that notwithstanding the Commerce Clause, that a "colored passenger, though INTERSTATE, and solely because of his

color and race'' must be compelled by the rules and regulations of a railroad company, when he comes within the borders of a State having a separate coach law, to remove from the first class car into a second class car? Can it be said that a decision of the highest Court of the State, affirming the decision of a trial Court, sustaining such proceeding of a railroad company, will remain unreversed?

If the State is prohibited from regulating INTERSTATE commerce, it is clearly apparent that a corporation, created by and under the laws of the State, is incapable of doing what the State cannot do. Plaintiff was an INTERSTATE passenger; his journey began at Washington, D. C., the capital of this Nation, and the end of it was Lexington, Kentucky. The law as to INTERSTATE passengers is very plain, as laid down by this Court, that when the journey of a passenger begins without the State and ends at a point within the State; or if his journey begins within the State and ends at a point without the State; then he is an INTERSTATE passenger, and the separate coach law is not applicable to such passenger. If the rule of the common carrier, or even the law of the State, be applied, in our judgment, ''to travel from one point within the State to another place within its border,'' this would apply likewise to, and interference with, the transportation of an INTERSTATE passenger. Plaintiff's journey began at Wash-

ington, D. C., but, on arriving at Ashland, he was compelled to change cars. It is apparent that from Ashland, Kentucky, he "traveled from a point in Kentucky to Lexington, Kentucky, a point in the borders of Kentucky;" yet his journey, as aforesaid, began at Washington, D. C.

We think it is clearly evident that the railroad company is endeavoring to regulate the transportation and carriage of INTERSTATE passengers, subversive of and contrary to the Commerce Clause of the United States. If this be not its intention, why should defendant in error, after this Court, in C. & O. Ry. Co. vs. Kentucky, 179 U. S. 389, determined that the Separate Coach Law of Kentucky did not apply to INTERSTATE passengers, now seek to enforce a rule or regulation contrary to the express decision of this Court as to the rights of INTERSTATE commerce passengers?

The criterion of the law is not where the "travel," but where the passenger "began" to travel. One, as aforesaid, an INTERSTATE passenger, necessarily, if he be coming to a point within the State, will have to have a "travelling" from a point within the State and end to a place within its border. Therefore, we say that the test is that where the journey "begins," as well as where it "ends" determine whether or not the Separate Coach Law or rule or regulation of the railroad under such a law, applies to the passenger.

Plaintiff presented his contention before the Appellate Court of Kentucky, and that Court, in affirming the judgment of the trial Court, upheld defendant in its abridgement of the rights of plaintiff, an INTERSTATE passenger, and thereby denied his rights specially set up and claimed as such passenger. If a common carrier be permitted to do this by an INTERSTATE passenger, what the State, under the Commerce Clause of the Constitution is not permitted to do, then it is clearly evident that colored persons traveling as INTERSTATE passengers are solely at the mercy of the common carrier, for it to do with them as it desires to do, uncontrolled by the Commerce Clause of the United States or the decisions of this Court, which alone regulates INTERSTATE commerce. Will this Court countenance, permit, or approve such conduct?

Under that law, the defendant herein enacted, and attempted to enforce rules and regulations subversive of the rights of plaintiff, an *INTERSTATE passenger.* This is evident from the evidence of the conductor at the time he accosted plaintiff to remove him from the first class car into the three-compartment second class car. He expressly told plaintiff that he had to move him in compliance with the laws of Kentucky (Record, p. 28, questions 5, 6 and 7), and the rules and regulations of the company, else he would be fined for non-compliance with the law himself.

True, we believe, were plaintiff only a passenger purchasing his ticket in Kentucky, for a point within Kentucky, both beginning and ending of his travel were in Kentucky, then the said law of the State, and the rules of the common carrier, a corporation carrying on business under the laws of said State, might therein govern his transportation (C. & O. Ry. Co. vs. Kentucky, 179 U. S. 388; Plessy vs. Ferguson, 163 U. S. 537). But when he purchases a ticket outside of the State for transportation to a point in the State; or purchases ticket within the State of Kentucky for a point ouside of the State of Kentucky, that then the Separate Coach Law of Kentucky cannot and does not apply to him as an INTERSTATE passenger, and the Kentucky Court has virtually decided thus; so does this Court (C. & O. Ry. Co. vs. Kentucky, 179 U. S. 389). This is held by the Kentucky Court itself in the decision in the case of Landers vs. Receiver of the Ohio Valley Ry. Co. (20 Ky. Law Reporter 926.)

The defendant in error in this cause, who was the plaintiff in error, C. & O. Ry. Co. vs. Kentucky, 179 U. S. 389, knows that from said decision, that neither the State nor a common carrier has a right to impose burdens, or to obstruct the free transportation of an INTERSTATE passenger, contrary to the Commerce Clause of the United State. And if the State cannot do such, it necessarily follows that defendant cannot, and that the State cannot delegate authority, or compel another to interfere

with such passengers contrary to the said Commerce Clause.

As this is the latest decision of this Court on this question, and same indisputably and incontroveriby establishes our contention, we have, therefore, adopted considerable portion thereof. Justice Brown, in delivering the opinion, among other things, said:

> As the Supreme Court of Mississippi had held that the statute applied solely to commerce within the State (66 Miss. 662; 2 Interstate Commerce Reporter, 615), that construction was accepted as conclusive here, and being a matter respecting commerce wholly within the State, and not interfering with commerce between the States, there was obviously no violation of the Commerce Clause of the Federal Constitution. Said Justice Brewer, in delivering the opinion of this Court: "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with, when to trains within the State is attached a separate car for colored passengers. * * * No question arises under this section as to the power of the State to separate in different compartments INTERSTATE passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the Commerce Clause."
>
> And further in discussing, Justice Brown says in the Landers' case, thus: That it was an action instituted by Landers and wife against the Receiver of the Ohio Valley Railroad, running from Evansville, Indiana, to Hopkinsville, Kentucky. Plaintiff's wife, who was joined with him in the suit, purchased

a first class ticket from Hopkinsville to Mayfield, both within the State of Kentucky, took her place in what was called the ladies' coach, and was ejected therefrom by the conductor, and assigned a seat in a smoking car, etc. It was held by the Court of Appeals that the decisions of this Court in the C., N. O. & T. P. Ry. Co. vs. Mississippi, 133 U. S. 587, 2 Interstate Reporter 801, and Plessy vs. Ferguson, 163 U. S. 537, were conclusive of the constitutionality of the act, so far as plaintiffs were concerned. It was urged in that case, as in this, that the act undertook to regulate or control as to INTERSTATE passengers, and that portion of the statute was *invalid,* as being in *conflict* with the *Interstate* Commerce Clause of the Constitution. In winding up this opinion, the Court said: If it were settled, as it is not, that the statute was invalid as to INTERSTATE passengers, the proper construction to be given it would then be that the Legislature did not so intend it, but only intended it to apply to transportation within the State, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the State. This ruling effectively disposed of the argument that the act must be considered to regulate the travel or transportation on railroads of all white and colored passengers while they are in the State, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the State line. Indeed, it places the Kentucky Court of Appeals in line with the Supreme Court of Mississippi in the C., N. O. & T. P. case, which had held that the Separate Coach Law of that State was valid as applied to domestic commerce.

"Granting that the last sentence from the opinion of the Court of Appeals above cited would seem to

justify the railroad in placing INTERSTATE colored passengers in separate coaches, we think that this prosecution does not necessarily invalidate that question, and the *act* must *stand*, so *far as it applies to passengers traveling between two points in the State.* Indeed, we are by no means satisfied that the Court of Appeals did not give the *correct* construction to the statute in *limiting* its operation to *domestic* commerce. It is *scarcely* courteous to impute to a Legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to INTERSTATE commerce, the law applying on its face to all passengers, should be limited to such as the Legislature were *competent* to deal with. The Court of Appeals (of Kentucky) has found such to be the intention of the General Assembly in this case, or, at least, that *if such* were not its intention, the *law may be supported as applying alone to domestic commerce.* In thus applying the *act* to be severable, it is *laying down a principle of construction from which there is no appeal.* While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law, if it had supposed that it applied *only* to *domestic* commerce, and, if we were in doubt on that point, we should unhesitatingly defer to the *opinions* of the *Court of Appeals* (Kentucky), which held that it would give it *that* construction, if the case called for it. In view of the language above quoted from the Landers case, it would be unbecoming for us to say that the Court of Appeals would not construe the law as applicable to *domestic commerce alone,* and, if it did, the case would fall directly within the Mississippi case (133 U. S. 587). We feel, therefore, compelled to give it that construction ourselves, and, so construing it, there can be no doubt as to its constitutionality (as applying *wholly to domestic commerce.*)

In Anderson vs. Louisville & Nashville R. R. Co., 4

Int. Com. Rep. 764, Ky. Case, Federal Court, Judge Barr, among other things, in overruling the demurrer to plaintiff's petition, said:

> "The next inquiry is whether this statute is in violation of the Commerce Clause of the Constitution of the United States, which gives Congress the exclusive right "to regulate commerce with foreign nations and among the States." If this statute be construed to include internal commerce of the State of Kentucky, AND NOT TO APPLY TO INTERSTATE COMMERCE, it is a proper exercise of the police power of the State, and is constitutional, as has been settled in the case of C., N. O. & T. R. Co. vs. Mississippi, 2 Int. Com. Rep. 801, 133 U. S. 587. See also Stone vs. Farmers L. & T. Co., 116 U. S. 307. The case of C., N. O. & T. R. Co. vs. Mississippi came to the Supreme Court upon the question, whether or not the railroad company was obliged, under the requirements of the statutes of the State of Mississippi to furnish separate cars or compartments for colored passengers, whose passage commence and ended in the State; and a majority of the Court did not attempt to decide, whether the statute would have been constitutional, if it had applied to INTERSTATE commerce."

In Hall vs. De Cuir, 95 U. S., 485, Chief Justice White said:

> That such legislation, which seeks to impose a direct burden upon INTERSTATE commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. Chief Justice Waite, in delivering the opinion said: "It does not act upon business through the local instruments to be employed after coming within the State, but directly upon business as it comes into the State from without or goes out from therein. While it

purports to control only the carrier, when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, can not but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the occupation of that cabin with such colored persons as may come on board afterwards, if the law is enforced. The Chief Justice added: That it was to meet just such a case that the Commercial Clause in the Constitution was adopted. * * * If each State was at liberty to regulate the conduct of carriers within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State, in respect to passenger and property brought from without. On one side of the river or its tributaries, he must be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of the State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be left separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity for his business, and to secure it, Congress, which is untrammeled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. * * *

If the public good requires such legislation, it must come from Congress and not from the States.

Plessy vs. Ferguson, 163 U. S. 537:

Petitioner Plessy had engaged and paid for first class passage on the East Louisville Railway, from New Orleans to Covington, in the same State; took possession of vacant seat in coach where white passengers were accommodated, and was ejected therefrom under Separate Coach Law of Louisiana, which was practically in the same terms as the statute of Kentucky under consideration. Further, the Court Said: On writ of error from this Court it was held that no question of interference with INTERSTATE commerce could possibly arise, since the East Louisville railway was purely a local line, with both its termini within the State of Louisiana. Indeed, the act was not claimed to be unconstitutional as interference with INTERSTATE commerce, but its invalidity was urged upon the ground that it abridged the immunities or privileges of citizens, deprived petitioner of his property without due process of law, and also denied him the equal protection of the law. And he further said: In view of the language, above quoted from the Landers' case, it would be unbecoming for us to say that the Court of Appeals would not construe the Kentucky law as applicable to domestic commerce alone; and if it did, the case would fall directly with the Mississippi. We, therefore, feel compelled to give it that construction ourselves.

In the case of Carrey vs. Spencer, Receiver of the E. T., V. & G. R. R. Co., Int. Com. Rep., Vol. 5, page 636, plaintiff, a colored woman, purchased a railroad ticket for first class passage over the right of defendant's road, and connecting lines, from New York to Knoxville, Tenn. One of the connecting lines was the E. T., V. & G. railroad. When the train arrived at or near the boundary of

Tennessee, Mrs. Carrey and her three children were compelled, in the middle of the night, to leave the first class car in which they had traveled from Lynchburg, Va., to make the remainder of the journey to Knoxville in what is known as a "Jim Crow" car. This is a car divided into two portions by means of a partition, one portion of the car being intended for white persons, the other for colored. * * * Defendants seek to justify the action of the conductor in requiring her to make the change, by reference to an act of the Tennessee Legislature, an Act to promote the comfort of passengers on railroad trains by requiring separate coaches for the white and colored races. Kentucky act similar to this.) The learned Judge Bartlett, delivering the opinion, further said:

> Such legislation as this has been upheld where it applied only to railroad trains running from one point to another within the limits of the State by which the law is enacted. In its application, however, to a passenger journeying from one State to another, upon an INTERSTATE railroad line, it is clearly an invasion of the powers conferred upon Congress by the Commerce Clause of the Constitution. L., N. O. & T. R. Co. vs. Mississippi, 133 U. S. 587, 2 Int. Com. Rep. 801; Hall vs. DeCuir, 95 U. S. 495. The plaintiff was an INTERSTATE passenger, and defendant, by authorizing the Pennsylvania Railroad Company to sell the ticket which entitled her to first class passage over their line, recognized her as such. They violated their obligation to furnish her with the stipulated transportation by compelling her to travel in a car which cannot be regarded as first class in any admissible interpretation of that term. The Tennessee statute affords no

legal justification for their course in this respect, and the plaintiff is entitled to recover damages, if receivers are liable in the Courts of this State, and I think they are thus liable, in view of the fact that the Court by which the receiver was appointed has expressly garnted leave to sue them here.

In Illinois Central Railroad Co. vs. Illinois, 163 U. S. 142, the court said:

> The State may make reasonable regulations to secure the safety of the passenger even on INTERSTATE trains while within its borders, but the State can do nothing that will directly burden or impede INTERSTATE traffic of the company or impair the usefulness of its facilities for such traffic.

In Hart vs. State of Maryland, 60 Atl. Rep. 457, 100 Md. 595, a criminal case, involving the right of an INTERSTATE passenger, colored person, appellant, Judge Boyd, after candidly and ably discussing the De Cuir case, says:

> "We have thus quoted at unusual length from that case, because it is relied upon by appellant as conclusive, and is sought to be distinguished from this case by the State. It must be admitted that there is unquestionably some distinction, but other decisions of the Supreme Court seem to intimate, although they do not definitely determine, that a law such as the law (meaning Separate Coach Law of Maryland) under consideration is unconstitutional, in so far as it is attempted to be applied to INTERSTATE passengers, and that Hall vs. De Cuir has often been cited, and much of the language used by the Chief Justice has been quoted from time to time in denying the right of States to interfere with INTERSTATE commerce.

Many illustrations might be given, from decisions of the Supreme Court to show the view of that Court on legislation by the States which in any way burdens or interferes with INTERSTATE commerce. The Court has undoubted knowledge of the classes of cases to which the police power of the State may be made applicable, but it has been very careful not to permit them to pass laws which in any way regulate the INTERSTATE commerce. Statutes which can reasonably be said to be necessary for the protection of passengers and property while being carried through a State have generally been sustained, and some that only affect the comfort and convenience of the public have also been; but not so much latitude has been allowed in the latter cases. * * * Although the State has power to adopt reasonable police regulation to secure the safety and comfort of passengers, on INTERSTATE trains while within its border, it is well settled, as herein seen, that it can do nothing, which will directly burden or impede the INTERSTATE traffic of the carrier, or impair the usefulness of its facilities for such traffic, when the same is national in its character and requires uniformity of regulation, affecting alike all the States, the power is in its nature exclusive, and the State cannot act. The failure of the Congress to act as to matters of national character is, as a rule, equivalent to a declaration that they shall be free from regulation or restriction by any statutory enactment, and it is well settled that INTERSTATE commerce is national in its character. Applying these general rules to the particular facts in this case, said the judge, and bearing in mind the application of the expressions used in the Hall-DeCuir case, involving questions more than analogous to that before us, we are forced to the conclusion, that this statute can not be sustained, to the extent of making INTERSTATE passenger amenable to its provisions. When a passenger enters a car in New York under a contract with the carrier to be carried through to the District of Columbia, if, when he reaches the Maryland

line, he must go into another car, regardless of the weather, the hour of the day or night, or the condition of his health, it certainly would, in many instances, be a great inconvenience and possibly hardship. It might be that he was the only passenger of his color on the train, and no other would go on in the State of Maryland, but he, if the law is valid, against him, must, as soon as he reaches the State line leave the car he started in and go into another, which must be furnished for him, or subject himself to a criminal prosecution.

Or take for illustration the Cumberland Valley road from Winchester, Va., to Harrisburg, Pa. In Virginia a law of this kind is in force, while in West Virginia and Pennsylvania there is none, as far as we are aware. On a train starting from Winchester, the passengers must be separated according to their color for six or eight miles, when it reaches the West Virginia line; then through West Virginia they can mingle again until they reach the Potomac, when they would be again separated, and so continue until they reach Mason and Dixon's line, when they are again permitted to occupy cars without regard to their color. If the railroad company did not deem it desirable or proper to have separate compartments throughout the journey, and oftentimes it might be wholly unnecessary for the comfort of the passengers, on said trans, as there might be very few colored persons on them, there would be at least three changes in that short distance. We cannot say, therefore, that as applied to INTERSTATE passengers, such a law as this would be so free from the objections pointed out in the cases above mentioned, as to be sustained under the police power of the States.

Although we have said above that there was a distinction between this case and that of Hall vs. De Cuir, we are of the opinion that the Supreme Court has intimated very strongly, that when a case such as this comes before it for decision, the same conclusion would be reached as in that case. * * * That law

was contrary to the Commerce Clause of the Constitution. That the language the Chief Justice used in that case would apply with equal force to this statute (Marlyland, likewise Kentucky), and the Supreme Court has over and over again, not merely cited that case as authority, but quoted at length the language used with approval. Although many of the decisions of that tribunal have been modified, distinguished, or overruled, and very few important cases have been decided on this clause of the Constitution without dissent from one or more of the Court, yet we find none from the language used by Chief Justice Waite. Without further discussing the subject, we are convinced from what it has already said that the Supreme Court will, when called upon to determine this precise question, decide that such a law as this is invalid in so far as it affects INTERSTATE passengers, and being of that opinion, we must accept that as the law by which we are to be governed.

He further said: In the case of Smith vs. Tennessee, 100 Tenn. 494, the contrary conclusion was reached in an exceedingly able opinion, but, as we understand the decisions of the Supreme Court (United States) on analogous questions, and the views so strongly indicated by them, on this particular subject, we do nto feel at liberty to follow the Tennessee Court.

In the Plessy case, 45 La. Ann. 80, the Court held a similar law to be unconstitutional. In Mississippi and Kentucky the State Courts so limited their decisions as to cause the Supreme Court to affirm them, on the ground that they had confined the statutes to intra-state passengers. This conclusion will require us to reverse the judgment appealed from, as the appellant was an INTERSTATE passenger.

Thus in one of the most able and exhaustive State decisions on the constitutionality of the Separate Coach law, decided March 22, 1905, by the learned Maryland

judge, 100 Maryland Reporter 595, seven years after the only decision we can find (Smith vs. Tenn. 100 Tenn. 494, March 12, 1898), holding that the law was constitutional, after careful and thorough examination of all the decisions on this question, both State and Federal, he arrived at the just and inevitable conclusion, that the Separate Coach law, as applied to INTERSTATE passengers was and is unconstitutional. Tennessee State standing alone, proves the general principles of the States, also the indisputable judgment of this Court, that Congress alone has the right to regulate INTERSTATE commerce passengers. Having in our judgment, by both State, and Federal decisions, incontrovertibly established and proved conclusively the second proposition, and state that from this also plaintiff is entitled to the relief he seeks therefore we now proceed with the third and last.

Proposition 3. That plaintiff has not been duly and fully heard in his contention, according to the fundamental and established law, or common justice guaranteed him under the Constitution and laws of Kentucky nor under the Constitution and laws of the United States.

Article 14, section 1, Constitution of the United States, among other things, provides:

> "That no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state

> deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Bill of Rights, Section 14 of the present Constitution of Kentucky, adopted September 28, 1891, provides:

> "That all courts shall be open, and every person for an injury done him, his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale or denial or delay.

This provision of the Constitution was enacted the 19th day of April, 1792, in the first Constitution of the State of Kentucky, and without any alteration or modification whatever, from that day to this, it remains inviolate and unchanged.

These basic principles ought to be recognized and held in proper regard by every person, corporation and State. But in plaintiff's case, they, as well as the provisions of the Kentucky Code of Practice, sections 334, 335, 337, 338, 339, 340, 342, 734, 756, 760, and 765, quoted in the statement and appearing in the record, as we believe, have been unwarrantedly and unjustifiably disregarded by the Appellate Court in the disposition of plaintiff's cause.

Plaintiff in strict compliance with the Kentucky Code of Practice for litigants in both the trial and appellate courts, duly excepted to all the adverse rulings of the

Although the verdict was against plaintiff, yet we feel confident now, as he did then, that if the court had permitted the competent and relevant evidence to go to the jury, and excluded the incompetent and irrelevant testimony, and Appellate Court had decided the issues, that the verdict eventually would have been for him. He insists now, as then, that he should have been permitted, by the court, to have answered the said questions; and appellate court should have duly considered and passed on the error of trial court in excluding same, because it is clearly apparent from the questions, what had preceded it. The attorney for the railroad company had injected words, to-wit, "White and white car" into the cause, which had never been used by plaintiff, in all of his insistence of his right, during the whole occurrence with the said railroad officials nor did he in his testimony use such. As plaintiff in his petition for rehearing (Record p. 55) said, to-wit:

> "That at no time when talking to appellee's agents or servants did he use the words to-wit: 'white' or 'white car,' or any such, but, on the contrary, the words he used were, to-wit: 'that he was an INTERSTATE passenger, and had first-class ticket, and was entitled to first class accommodation.' The words 'white' and 'white car' were intentionally used and injected into the trial of this cause, by appellee and its agent, etc. for a peculiar, predetermined, desired purpose, to-wit: to arouse the slumbering race passion and prejudice, and appellee intended at the time (defendant in error herein) that appellant (plaintiff in error herein) had none

of his own race on the jury, who could after such feeling had been thus set in action, when it retired to its room to consider of its verdict to explain to them appellant's true feeling, etc., and there help to assuage the feelings aroused and appealed to by appellee, in order to obtain an unjust and favorable verdict. Appellee accomplished its ultimate, final purpose, as the record shows. Such injustice!"

After appellant had respectfully, but yet positively and affirmatively and expressly called and directed the attention of the Appellate Court to the said errors not having been disposed of according to the Kentucky Code of Practice, he expected at least, that common justice would have been meted out to him, upon the record presented, as any other citizen, in the disposition of his case, especially when such had been brought to the attention of the Appellate Court. But not only did the said court disregard said petition, but it also disregarded the fundamental rule 2 of the court itself, which says:

"Whenever a case involving a constitutional question, either Federal or State, or in any case, where in the opinion of the chief justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved."

And Rule 13, which says:

"Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case.

And also Section 765 of the Kentucky Code of Practice, which states:

> "The court of appeals must deliver written opinions in all cases."

The record in the first instance shows that the Commissioner of the court, Mr. Carroll, examined and formulated the opinion of the court; and the petition for rehearing was ruthlessly, unkindly, also illegally disposed of by only an order, as follows, to-wit:

> "The court being sufficiently advised, it is considered that the motion and petition for a rehearing herein be, and the same is herewith overruled."

Where from the record, in State Court, can any one says who re-examined plaintiff's cause, upon his petition before said Court for a rehearing? Where from the said record can any one say that the whole Court, sat in judgment upon the said record involving a Federal question, as is required by Rule No. 2 of said Court?

Therefore it is apparent that not only did the said Court disregard the sections provided by Kentucky Code of Practice, for litigants to bring their cause before and in the said Court; but that it also expressedly set at naught its own RULES in disposing plaintiff's case.

Why such deliberate disregard of the well established and fundamental law and rule of practice and common justice, in a case involving the determination of a question affecting not only the material and substantial rights

of plaintiff, but also his race, as to INTERSTATE passenger, especially in Kentucky we are unable absolutely to say.

But is this the course of JUSTICE? Verily the words of HOLY writ are very applicable here:

> "NONE CALLETH FOR JUSTICE NOR PLEADETH FOR TRUTH:—AND JUDGMENT IS TURNED AWAY BACKWARD, AND JUSTICE STANDETH AFAR OFF: FOR TRUTH IS FALLEN IN THE STREET, AND EQUITY CAN NOT ENTER; YEA TRUTH FAILETH, AND HE THAT DEPARTETH FROM EVIL-MAKING HIMSELF A PREY." (ISAIAH 59:4, 14, 15.)

Is the manifestation of such procedure indicative of having one law for the stranger, as for one's ownself? (Lev. 24:22). For this mislcarriage of justice alone, in a judicial proceeding, it seems to us, plaintiff, in the highest Court of justice, on proper showing thereof, would be entitled to the relief he seeks.

In Walker vs. Savvinet, 92 U. S. 90, Chief Justice Waite said:

> "Due process of law does not imply that all trials in State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial procedure. What is due process of law in the States is regulated by the law of the States. The only jurisdiction of the Supreme Court is to determine whether it is in conflict with the supreme law of the land. It means in due course of legal proceedings, according to those rules and forms

which have been established for the protection of private rights."

Kinnaird vs. Louisiana, 92 U. S. 480.

Backus vs. Fort Street Union Depot Co., 169 U. S., 557.

Murray vs. Hoboken L. & I. Co., 18 Howard 280.

In Central Land Co. vs. Laidley, 159 U. S. 103, Justice Gray said:

> "Parties having been fully heard in the regular course of judicial proceedings, an erroneous decision of the State Court does not deprive the unsuccessful party of his property without due process of law."
>
> Tyler vs. Registration Judges, 179 U. S. 405.

The question is not whether a statute might be construed so as to cause it to violate the due process of law provision, but whether in the case presented it states that the statute is so applied as to deprive one of the right.

168 U. S. 674.

In Kreiger vs. Shelby Ry. Co., 125 U. S. 39, Justice Gray said:

> That where the statutes of a State require that written opinion be delivered by its highest Court, in all cases, and that they be recorded, the Supreme Court may examine the opinion so delivered and recorded, to ascertain the grounds of the judgment of the State Court.

Plaintiff was an INTERSTATE passenger; he was entitled to his rights as such under the law. The conductor of the train should have determined the carriage of this passenger, not by the color of h[illegible] skin, but by the

ticket he held, and, if he did not have a ticket, by inquiry as to where he was going, so that he might rightly determine the status of his passenger. This, we think, is the duty incumbent on all common carriers, thereby saving themselves and the passenger from much unnecessary litigation; if they but pursued the course they ought, letting the ticket and not the color of the skin determine the carriage of their passengers.

Plaintiff purchased his ticket at Washington, D. C., the capital of the nation. Under the law, from said point, although colored, purchasing a ticket for a place outside of Washington, and being an INTERSTATE passenger, he should have been accorded, his legal rights, under the Commerce Clause of the Constitution. As has been well said, if each State has to make regulations about INTERSTATE passengers, there would be great confusion, and the general government, knowing the fact, has strictly retained control over INTERSTATE commerce.

After having brought his cause in the courts, as such passenger, claiming his rights in his petition as such, evidence proving his contention, the trial Court should have either given the instruction asked for by him on his rights as an INTERSTATE passenger, or should have, of its own motion, given instructions embodying his rights, so that at least, the jury could have properly considered the contention of plaintiff in the Court.

The Appellate Court likewise should have legally and

duly considered errors of law properly brought to its attention by plaintiff (then appellant), and should have rightly disposed of same, and performed its indispensable duty as a court of justice before affirming decision on judgment of trial Court, to examine into every error of law complained of by him, to see whether or not same was in fact an error of law, and, thereafter either affirmatively or negatively, expressly to dispose of the same, before it affirmed the decision. By not having affirmatively or negatively, and expressly to dispose of by its conduct failing to dispose of the plaintiff's cause according to the fundamental and established law of Kentucky, or to the Federal law, or likewise common justice, which is due every person, who comes inside of the domain of this great Government with contentions in the courts of justice for adjudication.

Therefore, from the decisions of all the State Courts, with but the exception of the Tennessee case, Smith vs. State of Tennessee, decided March 12, 1898, 100 Tenn. R. 494, whether directly or indirectly, by determining cases coming before them, wherein the Separate Coach Law is involved, they all unanimously hold that such law, when applied to INTERSTATE commerce passengers, is unconstitutional and void. Thus the State Courts, with the Federal Courts, consider and recognize the Commerce Clause of the Constitution of the United States, and accord with the many decisions, in various cases, of this

Court, that Congress alone has the power to regulate INTERSTATE commerce. This being the law of the Government, and trend of the States, to interpret and respect and apply the law thus, will it dare be supposed or even taken for granted, that this Court will allow either a State, or railroad doing business in a State, to enact and enforce such a law, rule or regulation against an INTERSTATE passenger?

The record shows that the information which his ticket furnished was deliberately disregarded; it made no difference what kind of ticket he held, or what amount of money he had paid for it, or where he bought it, or where he was intending to go, or where his said ticket said he was going. But on the contrary, because he was a colored man, the defendant by and through its agents and employes, including a police officer, who arrested and ejected plaintiff from and out of the first class car, and compelled him to take passage, from Ashland, Ky., to Lexington, Ky., in a second class car, with three compartments therein, two of which were then used for smoking purposes; and the third compartment in which he was compelled as aforesaid, to ride, had that day been previously used by defendant for smoking car purposes, and the whole car, by defendant, considered and designated as "SMOKING CAR," OR SMOKING COMPARTMENT, etc., we say it made no difference, but because of his color, although he was an INTERSTATE *commerce passenger,*

yet he was required and compelled to accept the accommodations defendant chose to give him. Will this Court tolerate, for once, such conduct of a great corporation, even though it be doing business among the States?

We contend, that the proper determination of status of a passenger, by the common carrier, is not by color, or his condition, or race, but by the *ticket* he holds; or, if no ticket, then by his intention, at the time he boards the conveyance, and offers to pay, etc. If his ticket, or if he then purchases of conductor, on train a fare, and it shows that he is from a point without the State going to a point within the State, then he is an INTERSTATE passenger; if it show that both the beginning and ending of his journey are or will be in the State, then he is an INTRASTATE passenger; in the latter, if there be a Separate Coach Law, then it will apply; but in the former, if there be such a law, it will not, and does not, and cannot apply, and this Court has so held and will forever continue to hold.

Defendant was repeatedly informed, by plaintiff that he was an INTERSTATE passenger; and asked defendant to read his ticket, which it did; that the Separate Coach Law did not apply to him, etc., but yet all this did not avail him anything. The defendant testified what he said to plaintiff (Record, pp. 28 Q. 5 and 6; p. 38, Q. 102 and 104), to-wit:

That he was "to go in the compartment set aside for his race by the Statutes of Kentucky (Record, p. 28, Q. 5), and further." Well he (plaintiff) said he was a lawyer, in the conversation, and that he knew the law. I told him I couldn't help that; that the statutes were laid down, and the regulations were such that, I as conductor, was subject to a fine—and just in an ordinary conversation he said he was a lawyer, and knew the law, and I said, I can't help it, as I had nothing to do with that; that it was the rules and regulations of the road, as well as the laws of Kentucky compelling me to have him ride in the apartment set aside for colored people (R., 28, Q. 6 and 7). Did he say anything about being an INTERSTATE passenger? Yes, sir." (See also R. 32, Q. 47 and 48.)

All this was on direct examination, of defendant's chief witness, the conductor, Mr. Rigeway, by Col. John T. Shelby. But, further, upon cross-examination, by Col. C. J. Bronston, for plaintiff, he says (R. 38, Qs. 102 and 104):

"I ASKED HIM IF HE STILL REFUSED TO VACATE AND GO IN THE COMPARTMENT SET ASIDE BY THE STATE OF KENTUCKY." "I SAID, DO YOU STILL REFUSE TO GO IN THE COMPARTMENT SET ASIDE BY THE STATE OF KENTUCKY, JUST IN AN ODINARY WAY; and he said: "I AM AN INTERSTATE PASSENGER; I KNOW MY RIGHTS; I AM A LAWYER AND YOU WILL HAVE TO FORCE ME? AND I SAID, YOU REFUSE? AND HE SAID, I DO. I CALLED THE OFFICER, AND HE CAME, AND I SAID, ESCORT THIS GENTLEMAN TO THE COMPARTMENT SET ASIDE FOR HIS RACE."

In view of this direct testimony by defendant's own chief witness—only he and a brakeman testifying for the defendant—and with what plaintiff alleged in his petition, and proved by his evidence, it is clearly apparent that plaintiff was entitled to the INSTRUCTION on the law of the case, either directly, the INSTRUCTION he asked for as to his rights as an INTERSTATE passenger; or by the Court, of an instruction on its own motion, involving the same law; or it should have, instructed from the evidence, that although defendant was acting under the law of **Kentucky, that** it did not apply to such passengers, etc., but instead thereof it gave improper and erroneous, misleading instruction, upon denying plaintiff's right and claim specially set up, as an INTERSTATE passenger, we say in view of all this, will this Court permit the judgments of the Courts of Kentucky to remain unrevised or unreversed in this cause?

As before stated, we concede that both the State and the common carrier may make and enforce laws and rules for their own internal matters, etc., but when either or both, separately or conjointly, as was done by them with the plaintiff, as clearly appears from the record, that when they attempt and enforce such upon and against an INTERSTATE commerce passenger, that then their acts, as applied to him, are void, and responsibility attaches, for the wrong inflicted upon such passenger.

From the record it will appear that both the trial and

Appellate Courts justified the act of defendant; the trial Court, in total disregard of the rights and claims of an INTERSTATE passenger; and giving the aforesaid improper and erroneous, misleading instructions, on the law to the jury, and the jury finding for defendant under such instruction; and the Appellate Court, without proper examination and determination of each error of law, duly presented to it, by plaintiff, then appellant, for its adjudication, before affirming the judgment of the Fayette Circuit Court, and also in the way it considered and wrongfully disposed of his petition for re-hearing. Thus by such acts plaintiff has been, and was, denied his right and claim, specially set up, in his cause.

We have but one purpose in this matter; and that is to obtain what, under the law, this Court has said is now due plaintiff as a citizen of this great government, and that is JUSTICE. He was an INTERSTATE passenger, and therefore, although colored, was and is duly entitled to all the rights, privileges and immunities due every such passenger, when these rights and privileges, etc., have been expressly set up and claimed by him, at proper time and form, in regular legal proceeding, and same have been determined against him by a judgment of the highest Court of the State wherein he lives, and which is the highest determining Court, of such matter, in that State, then it is the indispensable duty of this Court to take cognizance of his claim, and to cause its

great Writ of Error to issue to the said State Court for it to bring the record of the cause to this Court for final determination; and if, upon the record presented, it sees that it has jurisdiction, it will forthwith duly inquire and properly examine into said cause, and thereafter, in its wise, great judgment, deal fearlessly and courageously, doing justly (2 Chron. 19:11), affirm, revise or reverse the judgment of the State Court, as it deems, under the law, JUSTICE demands.

We think that it is apparent from the whole record that plaintiff's cause has not been legally determined. But as the question of an INTERSTATE passenger's right has never come before this court directly for determination, although plaintiff has suffered wrong and injury at the hands of defendant in error, which, with the State, intended evil and injury, yet we feel that God permitted it, and will overrule the whole for good (Gen. 50:20). We believe and recognize that all things work together for good to them that love God (Romans 8:28), and that there is a time for all things (Eccles. 3:1), and that this is the Court and the time for His cause to be brought.

Believing, therefore, that we have now incontrovertibly established that plaintiff has not been fully heard, in his cause and contention, as an INTERSTATE commerce passenger, in State Courts, according to the well established and fundamental law of the said State, nor accord-

ing to common justice and the Federal law; and also have established that he, an INTERSTATE commerce passenger, did specially set up and claim his right, as such, at the proper time, and in the proper manner, and that neither the State nor defendant, or a common carrier, has the right to enact and enforce a law or rule or regulation to deny him, or deprive him, of his said right, contrary to, and subversive of, the Commerce Clause of the Constitution of the United States and believing that the conclusion is inevitable that plaintiff is entitled to the relief he seeks; therefore we do now hopefully and humbly submit our cause to this the highest Court of Justice, in this great Nation, which Court was, and is, "ordained to establish justice, insure domestic tranquillity, and secure the blessings of liberty" to all people of these United States, and which we also believe delights "to keep judgment and do justice" (Isaiah 56:1, Micah 6:8), and the members thereof "are the ministers of God attending upon this very purpose" (Rom. 13:7; Lev. 24:22; Deut. 1:16, 17).

We come in the name, help and strength of the God of Justice (Ps. 121:1 and 2 Ps. 27:1), against the defendant and to this, not pleading for mercy, but asking for justice, upon the whole record (Rev. 20:12), presented in this cause, firmly believing, patiently waiting, confidently expecting that the same will now, from this Court, be meted to us.

Therefore, we now, in conclusion, humbly submit our cause, and ask that plaintiff will be granted, what, in our judgment, the law says he is entitled to, and what JUSTICE demands, the relief he seeks, the reversal of the judgment of the Court of Appeals of Kentucky; and which we also hope and pray will be the judgment of this Court upon the whole record presented.

Therefore, we, with plaintiff and the ten millions of his race, do now patiently wait the final determination of this Court, upon this much perplexed, harassing question, the Sepate Coach Law, etc., as it affects INTERSTATE commerce passengers.

Respectfully submitted,

B. E. SMITH,
W. L. RICKS,
ALBERT S. WHITE,
J. ALEXANDER CHILES,
Counsel for Plaintiff in Error.

CITATIONS

JUSTICE.

Ps. 89:14, 27:1, 62:12, 121:1 and 2.
Isiah 56:1, 59:4, 14, 15.
Micah 6:8.
Jer. 17:10.
John 7:50.
Rom. 13:1-7. 8:28.
Rev. 20:12.
2 Chron. 19:11, 20:12 and 13.
Lev. 24:22.
Deut. 1:16 and 17.
Eccles. 3:1.
Gen. 50:20.
Preamble of the Constitution of the United States.
Bill of Rights of Kentucky.

LAW.

Par. 3, Sec. 8, Art. 1, Constitution of the United States.
Sec. 1, Art. 14, Constitution of the United States.
Revised Statutes of United States, Sec. 709.
C. & O. Ry. Co. vs. Kentucky, 179 U. S .389.
Tyler vs. Registration Judge, 179 U. S. 401.
Backus vs. Fort St. W. D. CO., 169 U. S. 557.
I. C. R. Co. vs. Illinois, 163 U. S. 142.
C. L. I. Co. vs. Laidley, 159 U. S. 105.
Plessy vs. Ferguson, 163 U. S. 537.
Kreiger vs. Shelby, 125 U. S. 39.
Hall vs. De Cuir, 95 U. S. 485.
Walker vs .Sauvinet ,92 U. S. 90.
Kinnaird vs. Louisana, 92 U. S. 480.
Murray vs. Hoboken L. & I. Co., 18 How. 280.
Anderson vs. L. & N. Ry. Co., 4 Inters. Com. 764.

Dred Scott vs. Sanford, 60 U. S. 393.
Carrey vs. Spencer, 5 Interstate Com. R. 636.
Bill of Rights of Ky. Sec. 14.
Statutes of Kentucky, Secs. 795 to 801 inclusive.
Ky. Code of Prac. Chap. 2, Title 9, Art. 5, Secs, 340, 342.
Ky. Code of Prac. Chap. 2, Title 9, Art. 4, Secs. 334, 335, 337, 338 and 339.
Ky. Code of Prac. Chap. 1, Title 18, Secs. 734, 756, 760 and 765.
Landers, etc., vs. Receiver of O. V. Ry. Co., 20 Ky. Law Report, 926.
Hart vs. Maryland, 100 Md. 595.

Office Supreme Court, U. S.
FILED.
JAN 28 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM 1909.

No. 158.

J. ALEXANDER CHILES . . . . . Plaintiff in Error

v.

CHESAPEAKE & OHIO RAILWAY COMPANY . . Defendant in Error

Brief for Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

JOHN T. SHELBY,
For Defendant in Error.

HENRY T. WICKHAM,
HENRY TAYLOR, JR
Of Counsel.

JAMES E. HUGHES, LAW PUBLISHER, LEXINGTON, KY.

(21,165.)

SUPREME COURT OF THE UNITED STATES

October Term, 1909.

No. 158.

J. ALEXANDER CHILES.....Plaintiff In Error

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY.....Defendant In Error

BRIEF FOR DEFENDANT IN ERROR.

The facts out of which this litigation has arisen are, so far as they are pertinent to the question raised in this Court, as follows:

The plaintiff in error, a colored man, took passage at the City of Washington upon one of the trains of the defendant in error, his destination being the City of Lexington, Ky. He held a first-class through ticket. At Ashland, Ky., all passengers upon that train who were bound for Lexington and Louisville (except such as were occupants of what is called the Louisville sleeper)

had to take another train of the defendant, which ran over the Lexington Division, the Louisville sleeper being the only one of the coaches coming from Washington which was detached from the first mentioned train and attached to the one which ran from Ashland to Lexington. Plaintiff was not an occupant of the sleeping car, but rode in an ordinary first-class coach from Washington to Ashland. At the latter point, therefore, he changed to the Lexington Division train, and, over the objection of the brakeman, went into the coach which was set apart by the Railway Company for the exclusive use of white passengers. He was compelled by the conductor, against his earnest protest, but without the use of any actual force, to remove from this coach into the one immediately in front of it, a compartment of which had been set apart for the exclusive use of colored persons. In this latter coach he rode from Ashland to Lexington.

He subsequently brought this action in the Fayette Circuit Court of Kentucky for the recovery of damages on account of his alleged wrongful ejection from what is known as the "white coach," and the alleged wrongful refusal of the defendant to carry him as a first-class passenger from Ashland to Lexington.

By the second paragraph of its answer (Record p. 3) the defendant, after setting up the facts as to the change of trains at Ashland and the removal of plaintiff by

the conductor from the white to the colored coach, alleged "that under the rules and regulations adopted by it colored persons are, and were then, carried within the territorial limits of the State of Kentucky in other coaches than those in which white persons are carried, and that there is, and then was, no difference or discrimination in the quality, convenience or accommodations in the cars or coaches set aside for the exclusive use of the two respective races; and that there was no such difference or discrimination between the car from which plaintiff was required to remove and the car into which he was required to remove on the occasion referred to."

It will be observed that there was no attempt made to rest the defense upon what is known as the Separate Coach Statute of Kentucky, which could not, of course, apply to the case of an interstate passenger, but solely upon the ground that the Company had adopted a rule or regulation requiring the transportation of white and colored persons in Kentucky in separate coaches; that there was no difference or discrimination as respects quality, convenience or accommodations in the coaches assigned to the two races respectively; and that, in this particular instance, there was no such difference or discrimination between the car from which plaintiff was removed and that in which he was compelled to travel.

This defense was, upon demurrer, held to be good (Record p. 4), and plaintiff having put in issue the

material allegations thereof by his reply (Record p. 5), a trial was had in the Circuit Court, resulting in a verdict and judgment for the defendant (Record pp. 6-7). Plaintiff's motion for a new trial having been overruled (Record p. 8), he prosecuted an appeal to the Court of Appeals of Kentucky, where the judgment of the Circuit Court was affirmed (Record p. 46; 125 Ky. 299; 11 L. R. A., N. S., 268; 101 S. W. 386); and to reverse this judgment of affirmance the present writ of error is taken.

Upon the trial in the Circuit Court plaintiff requested an instruction to the effect that it being admitted that he was an interstate passenger, defendant had no right to require him to ride in a coach set apart for the exclusive use of colored people, and that if it did compel him to do so by force, threats or duress he was entitled to recover (Record p. 15). The court refusing to give such an instruction submitted to the jury three questions of fact: first, whether the defendant had such a rule or regulation providing for the transportation of white and colored passengers in separate coaches; second, if so, whether such regulation was reasonable; third, whether the coach in which plaintiff was compelled to ride from Ashland to Lexington was substantially equal in convenience, comfort and safety to that provided for white passengers; and the jury were instructed that if they found affirmatively upon all these three questions

they should render a verdict for the defendant. (Record p. 16.)

The verdict for the defendant, therefore, necessarily imports a finding that, as matter of fact, the plaintiff was furnished accommodations equal to those provided for white passengers, and that his transportation in a coach assigned to the exclusive use of colored persons was in pursuance of a reasonable rule or regulation adopted by the defendant.

ARGUMENT.

I.

From the foregoing statement it will be seen that the precise question presented for decision upon the record in the Kentucky Court of Appeals was this: May a common carrier, independently of any statutory requirement, lawfully adopt and enforce a regulation providing for the transportation of white and colored interstate passengers in separate coaches? This question the judgment of that Court answered in the affirmative, and that it was correctly answered would seem to be too clear at this day for debate.

The reasonableness of the policy of separating the two races, where it can be done without violating the personal, property or political rights of either, is now generally conceded as a civic proposition; and that, with-

out such violation, it may be done in the use of various public facilities—such, for instance, as public schools and public conveyances—when equal accommodations are provided, is settled by a long line of judicial decisions. For the convenience of the Court, should it be deemed desirable to re-examine the question, a list of some of the cases is here given:

Roberts v. City of Boston, 5 Cush., 198.
State v. McCann, 21 Ohio St. 198.
W. C. &c. R. R. Co. v. Miles, 55 Pa. St. 209.
Day v. Owen, 5 Mich. 520.
Britton v. A. C. Airline Ry. Co., 88 N. C. 542.
The Sue, 22 Fed 843.
Murphy v. W. & A. R. R. Co., 23 Id. 637.
Houck v. Southern Pac. Ry. Co., 38 Id. 226.
Hall v. DeCuir, 95 U. S. 485.

The opinion in the case at bar of the learned Circuit Judge (Record p. 8) and of the Kentucky Court of Appeals (Record p. 46) would seem to leave nothing further to be said upon the subject.

If it be conceded that a common carrier may, as a general proposition, provide, under proper conditions, for the separation of white and colored passengers, it is not conceivable that this right could in any way be affected by the fact that in a given case the person as to whom it was exercised was an interstate passenger. For, as was ruled in *Hall v. DeCuir, supra,* congressional inaction upon the subject has left the carrier to adopt such reasonable rules and regulations for the disposi-

tion of passengers upon its conveyances as may seem to it most for the interest of all concerned (95 U. S. 490).

It is, therefore, confidently submitted that, even if this Court should consider that it had jurisdiction to review the judgment from which this writ of error is prosecuted, the point decided by that judgment was ruled correctly.

II.

It is, however, respectfully suggested that no Federal question is presented by the record.

If we understand the claim made in the elaborate and quite unique brief filed for the plaintiff in error it is that there has been a denial of some right secured to him by section 1 of the XIV Amendment. This contention, however, is clearly not maintainable.

1. In *Louisville, N. C. & T. R. Co. v. Mississippi, 133 U. S. 587, Plessy v. Ferguson, 163 U. S. 537, and C. & O. Ry. Co. v. Kentucky, 179 U. S. 388,* this Court held to be constitutional state statutes requiring, as to intrastate passengers, the carriage in separate coaches of white and colored persons. If the enforced separation of the races in public conveyances be a violation of any right secured by the XIV Amendment, it would be equally a violation whether accomplished by a state law as to intrastate passengers or by a voluntary regulation of the carrier as to all passengers; and conversely,

if such separation be not a violation of such rights when made under a state law in the case of transportation wholly within the state, no more is it such violation when made by the carrier under regulations voluntarily adopted by it as to all passengers, whether interstate or intrastate.

2. The separation here complained of was not made in obedience to a statute, but was a voluntary act of the carrier pursuant to one of its own regulations. Whether lawful or unlawful, therefore, it cannot be considered a violation of rights secured by the XIV Amendment; for it is well settled by repeated decisions of this Court that the duty incumbent upon every republican government to protect its citizens in the enjoyment of that equality of rights which is a fundamental principle of such government is one which, under our Federal system, remains with the several States; that the first section of the Amendment is a prohibition upon State, not individual, action; that it adds nothing to the rights of one citizen as against another, but simply furnishes an additional guaranty against any encroachment *by the States* upon those fundamental rights which belong to every citizen as a member of society:

> *United States v. Cruikshank, 92 U. S. 553-4. . . . . 8 Rose's Notes 840.*

If the foregoing views, or either of them, be correct, there is really no Federal question involved here, and

this Court, taking notice of its want of jurisdiction, will, without any formal motion for such action, dismiss this writ of error under the rule in *Mills v. Brown, 16 Pet. 525.*

Respectfully submitted,

JOHN T. SHELBY,

For Defendant In Error.

HENRY T. WICKHAM,

HENRY TAYLOR, JR.,

Of Counsel

POINTS.

A common carrier may, irrespective of statutory authority, adopt and enforce a regulation providing for the transportation in separate coaches of white and colored passengers:

Roberts v. City of Boston, 5 Cush. 198.
State v. McCann, 21 Ohio St. 198.
W. C. &c. R. R. Co. v. Miles, 55 Pa. St. 209.
Day v. Owen, 5 Mich. 520.
Britton v. A. C. Airline Ry. Co., 88 N. C. 542.
The Sue, 22 Fed. 843.
Murphy v. W. & A. R. R. Co., 23 Id. 637.
Houck v. Southern Pacific Ry. Co., 38 Id. 226.
Hall v. DeCuir, 95 U. S. 485.

II.

The constitutionality of state statutes enforcing the use of "separate coaches" for intrastate passengers having been upheld by this Court,

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587.
Plessy v. Ferguson, 163 U. S. 537.
C. & O. Ry. Co. v. Kentucky, 179 U. S. 388.

it follows that if a separation of intrastate passengers so enforced be not a violation of the Fourteenth Amendment, a carrier may, without such violation, voluntarily adopt a regulation for the separation of all passengers, whether intrastate or interstate.

III.

The first section of the Fourteenth Amendment is intended to protect the rights therein enumerated not against invasion by individuals, but against invasion by governmental action of the State:

U. S. v. Cruikshank, 92 U. S. 553-5.
8 Rose's Notes 840.

IV.

Want of jurisdiction being shown by the record, this Court will, of its own motion, dismiss the writ of error:

Mills v. Brown, 16 Pet. 525.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909

NO. 158

J. ALEXANDER CHILES - - - - Plaintiff in Error

v.

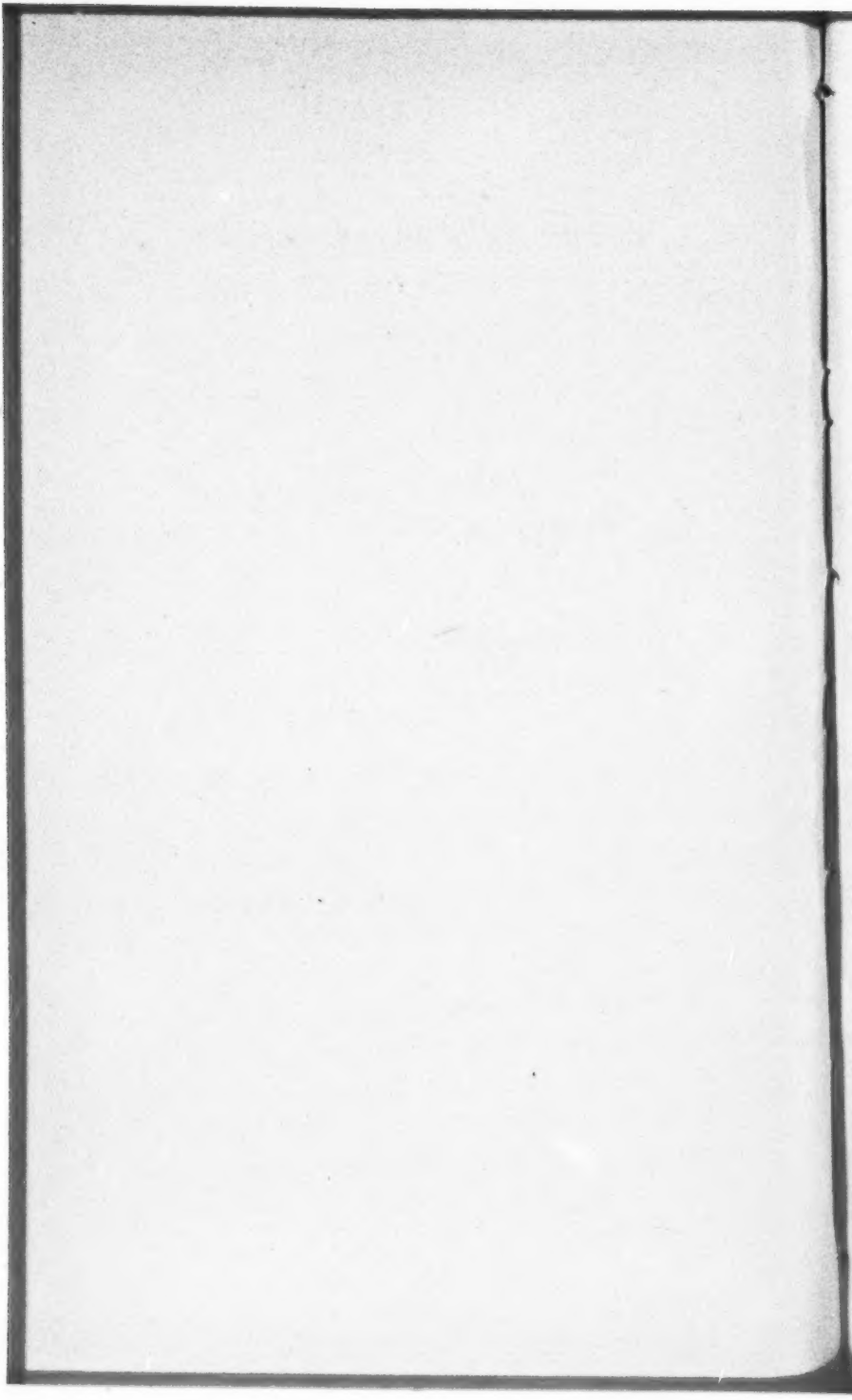
CHESAPEAKE & OHIO RAILWAY COMPANY - - Defendant in Error

Reply Brief for Defendant in Error.

JOHN T. SHELBY,
For Defendant in Error.

HENRY T. WICKHAM,
HENRY TAYLOR, JR.,
Of Counsel.

21,165



SUPREME COURT OF THE UNITED STATES

October Term, 1909.

No. 158.

J. ALEXANDER CHILES, ...Plaintiff in Error

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY, ...Defendant in Error

REPLY BRIEF FOR DEFENDANT IN ERROR.

In the brief of defendant in error it was suggested that there was no Federal question presented by this record. In response to this a brief has been filed for plaintiff in error apparently in anticipation of a motion by defendant in error to dismiss the writ. We have not made, nor do we propose to make such motion.

It was pointed out, however, in our original brief that no question under the 14th Amendment was involved. But, as we now understand from the response made to this suggestion, it is insisted that a Federal question is presented because the record shows that plaintiff in error was an interstate passenger and that upon that ground he denied the right of defendant in

error to enforce its regulation regarding the separate transportation of white and colored passengers in Kentucky.

The brief of plaintiff in error does not indicate how the fact that the Constitution confers power upon Congress to regulate commerce between the states would make it improper for an interstate passenger carrier to adopt reasonable regulations for carrying on its business. Without such power it could not do its business at all. The Congress has not attempted to prescribe any rule upon the subject of the separation of the races in interstate passenger traffic; and as was clearly pointed out in *Hall v. DeCuir, 95 U. S. 485, 490,* the very fact of "congressional inaction" as to this matter leaves the carrier "at liberty to adopt such reasonable rules and regulations for the disposition of passengers" in its conveyances as may seem to it "most for the interest of all concerned."

The claim of Federal question must, in order to confer jurisdiction upon this Court, be a real, not a frivolous or fictitious claim; and the mere circumstance that plaintiff in error was an interstate passenger and for this reason denies in this action the carrier's right to enforce its regulation as to him, is not sufficient to bring his claim of Federal question within the former category. As was said in *New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344,*

> "It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it

> destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

It is plain that the supposed Federal question under the interstate commerce clause of the Constitution is a fictitious, not a real, one and cannot avail to give jurisdiction to this Court.

Respectfully submitted,

JOHN T.SHELBY,

For Defendant in Error.

HENRY T. WICKHAM,

HENRY TAYLOR, JR.,

Of Counsel.